of Canada

Canadian Theses Service

Ottawa, Canada
K1A 0N4

du Canada

Service des thèses canadiennes

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

NL-339 (r. 88/04) c

Canada

UNIVERSITY OF ALBERTA

THE CHARTER OF RIGHTS AND THE WELFARE STATE IN CANADA

BY

STEPHEN PHILLIPS

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

DEPARTMENT OF POLITICAL SCIENCE

EDMONTON, ALBERTA

SPRING 1991

National Library of Canada
Bibliothèque nationale du Canada

Canadian Theses Service
Service des thèses canadiennes

Ottawa, Canada
K1A 0N4

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-315-56647-1

Canada

UNIVERSITY OF ALBERTA

RELEASE FORM

NAME OF AUTHOR: STEPHEN PHILLIPS

TITLE OF THESIS: THE CHARTER OF RIGHTS AND THE WELFARE STATE IN CANADA

DEGREE: MASTER OF ARTS

YEAR THIS DEGREE GRANTED: 1991

PERMISSION IS HEREBY GRANTED TO THE UNIVERSITY OF ALBERTA LIBRARY TO REPRODUCE SINGLE COPIES OF THIS THESIS AND TO LEND OR SELL SUCH COPIES FOR PRIVATE, SCHOLARLY OR SCIENTIFIC RESEARCH PURPOSES ONLY.

THE AUTHOR RESERVES OTHER PUBLICATION RIGHTS, AND NEITHER THE THESIS NOR EXTENSIVE EXTRACTS FROM IT MAY BE PRINTED OR OTHERWISE REPRODUCED WITHOUT THE AUTHOR'S WRITTEN PERMISSION.

Stephen Phillips

Stephen Phillips
14108 - 59th Avenue,
Edmonton, Alberta
Canada

Date: 12 April 1991

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

THE UNDERSIGNED CERTIFY THAT THEY HAVE READ, AND RECOMMEND TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH FOR ACCEPTANCE, A THESIS ENTITLED "THE CHARTER OF RIGHTS AND THE WELFARE STATE IN CANADA" SUBMITTED BY STEPHEN PHILLIPS IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS.

Allan Tupper

T.C. Pocklington

June Ross

Date: 10 April 1991

ABSTRACT

This paper studies the impact of the Charter of Rights and Freedoms on the welfare state in Canada. It begins with an overview of four implications of the Charter for the welfare state: namely, the recognition of substantive welfare rights, the curtailment of social programmes, the establishment of procedural welfare rights, and the use of the equality provisions of the Charter to expand the scope of existing social benefits. It then examines four cases in which the Charter has been used to challenge selected income maintenance programmes. The first case concerns an unsuccessful attempt to curtail the Newfoundland Workers' Compensation Act. In the other cases, the Charter was used successfully to challenge the denial of equal benefits to particular groups under three social programmes.

The paper contends that the Charter is a potentially important force shaping the development of the welfare state. In particular, the Charter may be used to challenge inequalities in the coverage or benefit levels of established social programmes. The net effect of such challenges, however, depends on the response of governments. While the government may respond to an adverse Charter ruling by providing additional benefits to one class of claimants, it may choose to recoup this cost by reducing the benefits provided to other classes of claimants.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION 1

CHAPTER 2

IMPLICATIONS OF THE CHARTER FOR THE WELFARE STATE 12

CHAPTER 3

WORKERS' COMPENSATION AND THE CHARTER 30

CHAPTER 4

EQUAL BENEFIT OF THE LAW AND EQUAL BENEFITS 48

CHAPTER 5

THE CHARTER AND THE WELFARE STATE: SOME EARLY OBSERVATIONS 81

CHAPTER 6

CONCLUSION 101

BIBLIOGRAPHY 104

1. Introduction

The entrenchment of the Charter of Rights and Freedoms in the Canadian Constitution in 1982[1] was a watershed in the political and constitutional development of the country. As Donald V. Smiley observed, it brought about the single most important change ever effected to Canada's constitutional structure, making a "decisive break" with the incremental approach which had hitherto characterized the process of constitutional change in Canada.[2]

As part of the country's supreme law, the Charter circumscribes the allowable scope of governmental action. More precisely, the Charter enumerates a series of guarantees to which federal and provincial legislation, and a host of public policies and actions, must conform. For this reason the advent of the Charter is said to have abolished the doctrine of parliamentary supremacy, or at least to have modified it substantially.[3] Accompanying this diminution of the powers of the legislature is a corresponding enhancement of the role of the judiciary. As interpreters of the Constitution, the courts have the responsibility of determining the application of the Charter, the content of Charter rights, and, perhaps most controversially of all, the legitimacy of legislative infringements of Charter rights under section 1 of the Charter. This provision declares the rights enumerated in the Charter to be "subject to such reasonable limits prescribed by law as may be demonstrably justified in a free and democratic society."

---

[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (UK), 1982, c.11.
[2] Donald V. Smiley, *The Federal Condition in Canada* (McGraw-Hill Ryerson, 1987), 57.
[3] As many observers have noted, parliamentary supremacy in Canada was already limited by the federal division of powers and by several other provisions of the *Constitution Act, 1867*, including denominational school rights, the bilingualism provisions of section 133, and the disallowance power.

Political Impact of the Charter

In addition to its undoubted impact on Canada's constitutional structure, the Charter has a broader, though less determinate, political significance. Peter H. Russell, Alan C. Cairns, and others have described the Charter as a "nationalizing" force in that it provides all Canadians with a common set of constitutional entitlements secured by national institutions.[4] As Russell astutely predicted in the early days of the Charter, public debates over controversies arising from Charter litigation would tend to be national in scope; moreover, the issues themselves, from abortion to film censorship, would tend to "transcend the regional cleavages which are usually a feature of national political controversy in Canada."[5] More concretely, Russell has pointed out that by virtue of the unified structure of the judiciary in Canada, with final appellate authority resting in the Supreme Court of Canada, the Charter can be expected to yield over time a body of decisions imposing uniform standards across the country in policy fields which "otherwise would be subject to diverse provincial standards."[6]

Scholars have also speculated about the Charter's impact on political behaviour and patterns of political influence. It has been noted, for example, that by significantly expanding the scope of judicial review, the Charter creates new avenues for interest groups to challenge public policies which they find objectionable. As F.L. Morton observes, "Interest groups which fail to achieve their policy objectives through traditional political party and bureaucratic channels can now turn to the courts."[7]

---

[4] Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983) 30; Alan C. Cairns, "The Canadian Constitutional Experiment" in Douglas E. Williams, ed., *Constitution, Government, and Society: Selected Essays by Alan C. Cairns* (Toronto: McClelland and Stewart, 1988) 255.
[5] Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," 41.
[6] *Ibid.*
[7] F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms," *Canadian Journal of Political Science* 20:1 (1987) 40.

Indeed, in anticipation of launching or intervening in Charter cases, numerous interest groups, such as the Canadian Civil Liberties Association and the Canadian Advisory Council on the Status of Women, established special Charter action funds.[8]

In addition to creating new opportunities for constitutional litigation, the Charter may in fact encourage it by instilling in Canadians a heightened rights consciousness. As Seymour Martin Lipset recently observed, "the Charter brings Canada much closer to the American stress on protection of the individual and acceptance of judicial supremacy with its accompanying encouragement of litigiousness than is true of other parliamentary countries."[9] Charles Taylor, on the other hand, doubts that the existence of the Charter is sufficient by itself to cause Canadians to abandon their relatively strong sense of community identity in favour of the "atomist consciousness" of Americans.[10]

Nature of Judicial Review under the Charter

The implications of the Charter for public policy are potentially far-reaching. Section 52 of the *Constitution Act, 1982* declares the "Constitution of Canada" (of which the Charter is expressly stated to be an element) to be the supreme law of Canada. It further declares that any law which is inconsistent with the Constitution is of no force or effect. Such "inconsistencies," however, are not necessarily self-evident. This is largely due to the indeterminate nature of many of the rights enumerated in the Charter. As Patrick Monahan puts it: "Many of these rights--notably the right to 'equality' and 'liberty'--contain little or no substantive criteria; they resemble blank slates on which the judiciary can scrawl the imagery of their choice."[11] The courts, therefore, are charged with the important task of defining the scope and content of Charter rights and determining the application of such rights to impugned legislation. This exercise inevitably requires the judges to assume a more forthrightly political role than was the case prior to 1982. As Peter Russell observes, Charter review obliges the courts "to identify the human activities and interests which are to be given a priority position in the Canadian legal system such that the state must always justify its encroachment upon them."[12]

---

[8] Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 156.

[9] Seymour Martin Lipset, *Continental Divide* (Toronto: C.D. Howe Institute, 1989) 3.

[10] Charles Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in Cairns and Williams, *Constitutionalism, Citizenship and Society in Canada*, 211-212.

Russell goes on to note that in interpreting the provisions of the Charter, the courts are performing a "constitution-making role which is at least as significant as that performed by the politicians and civil servants who wrote the Charter."[13] This expresses the fact that judicial interpretation of the Charter (and, for that matter, of other parts of the Constitution) itself becomes part of the constitutional law of the land. Such judicial pronouncements are therefore difficult to alter or reverse. Indeed, once the appeal process is exhausted, a contentious constitutional ruling can only be reversed by constitutional amendment or by the court's agreeing to overrule itself in a subsequent case. Section 33 of the Charter provides an important exception to this. This provision permits Parliament and the provincial legislatures to adopt laws which conflict with certain rights enumerated in the Charter. More precisely, section 33 permits the legislature to declare that specified statutory provisions shall operate notwithstanding the rights set out in section 2 and sections 7 to 15 of the Charter[14]. When the

---

[11] Patrick Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987) 53.

[12] Peter H. Russell, "Canada's Charter of Rights and Freedoms: A Political Report," in A.W. Bradley, ed., *Public Law* (London: Stevens and Sons,1988) 395.

[13] *Ibid.*

[14] Declarations under section 33 are valid for up to five years at which point they may be re-enacted by the legislature for subsequent five-year intervals.

"notwithstanding clause" was inserted into the Charter, it was widely assumed that the Canadian public's abiding commitment to civil liberties would ensure that legislatures made use of section 33 only very sparingly. Indeed, outside Quebec, the clause has been invoked only once. Nevertheless, it represents an important concession to parliamentary sovereignty and was an essential element of the political accord between Ottawa and nine of the provinces which paved the way for patriation in 1981.

The Charter of Rights and the Welfare State

In discussions about the Charter's long-term implications for public policy, one area of particular controversy concerns the impact of the Charter on the welfare state. That issue is the focus of this paper. The term "welfare state" is employed in two general senses. The first refers to a variety of social benefits designed to provide for the economic and physical security of citizens, from old age pensions and social assistance to subsidized housing and universal health care. A second, broader definition includes fiscal and regulatory measures designed to alleviate the harshest features of the capitalist market system. Such measures include counter-cyclical budgeting, agricultural price supports, regional development assistance, and consumer protection laws. In this paper, I employ the first of these definitions unless stated otherwise.

Opinions regarding the significance of the Charter for the welfare state vary considerably. On one side of the issue are certain critics of an entrenched Charter, such as Andrew Petter and Michael Mandel, who fear that it may be used to dismantle social programmes or, more generally, to restrict the ability of the state to regulate the activities of capitalist business enterprise.[15] According to this view, the Charter embodies assumptions about individual liberty and limited government which are antithetical to the modern welfare state. One such assumption is that liberty is a wholly negative concept: that is, that it consists merely in the absence of wilful interference with indiviual freedom of action. A second assumption is that constitutional protections are only required or justified in the case of governmental infringements of liberty.[16] Non-governmental or private action, it is noted, lies beyond the purview of the Charter.

On this view, the Charter fails to acknowledge the capacity of the state to enhance liberty and to advance other social values through positive legislative action. For example, it ignores the benefits which have accrued to millions of Canadians through a host of social programmes and regulatory policies. In practical terms, it is argued that the negative freedoms enshrined in the Charter may be used to curtail or dismantle welfare state legislation.

Other observers take a more sanguine view of the Charter. Some contend that section 7 of the Charter may be interpreted by the courts to guarantee the provision of basic social and economic benefits.[17] This section guarantees everyone the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A less radical suggestion is that section 7 may be used to enlarge the procedural rights of social welfare recipients. More precisely, it is argued that section 7 may be construed by the courts to require governments to establish certain procedures permitting recipients of social benefits to appeal administrative decisions curtailing or denying their benefits.[18]

---

[15] Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda," *The Advocate* 45 (1987) 857; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

[16] Allan C. Hutchinson and Andrew Petter, "Private Rights, Public Wrongs: The Liberal Lie of the Charter," *University of Toronto Law Journal* 38 (1988) 283.

[17] Martha Jackman, "The Protection of Welfare Rights under the Charter," *Ottawa Law Review* 20:2 (1988) 257; Linda Gehrke, "The Charter and Publicly Assisted Housing," *Journal of Law and Social Policy* 1 (1985) 17.

Other commentators stress the Charter's potential to expand the welfare state by providing a constitutional basis on which to challenge "discriminatory" gaps in the the coverage of existing social programmes. The relevant Charter provision in this connection is section 15(1), the text of which is as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

As numerous observers have noted, a broad reading of section 15 could open to challenge many programmes which differentiate among classes of claimants in the allocation of various social benefits. As F.L. Morton and Leslie Pal point out, "discrimination, in the dictionary sense, is required by almost all social benefit programmes."[19] The result, in Keith Banting's view, is that section 15 may be used by individuals to challenge programmes which deny them benefits. He predicts that the "cumulative effect of hundreds of such initiatives will be an incremental expansion in the social commitments of the Canadian state."[20]

These divergent interpretations of the Charter are not necessarily incompatible with one another. Certain welfare state benefits could conceivably be given constitutional recognition by the courts, others could be enhanced through procedural guarantees, while still others could be broadened through the equality guarantees in section 15. At the same time, certain welfare state measures might be found to violate specific provisions of the Charter and accordingly be struck down. The implications of each of these approaches are discussed at greater length in the following chapter.

---

[18] Ian Morrison, "Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare," *Journal of Law and Social Policy* 4 (1988) 1.

[19] "The impact of the Charter of Rights on public administration," *Canadian Public Administration* 28:2 (Summer 1985) 221-43.

[20] *The Welfare State and Canadian Federalism* , 2nd Ed. (Kingston and Montreal: McGill-Queen's University Press, 1987) 205. It should be noted that the scope of section 15(1) is narrowed by subsection (2). This provision states that subsection (1) does not affect the validity of programmes designed to ameliorate the conditions of "disadvantaged individuals or groups, including those who are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Measuring the Charter's Impact

Since the Charter came into effect, there have been approximately five hundred reported cases per year in which Charter issues have been litigated.[21] Relatively few of these cases have concerned social welfare legislation. In a study prepared in 1988, the Canadian Advisory Council on the Status of Women identify twenty-five reported cases in which social assistance or income security programmes were challenged under section 15.[22] Even fewer cases of this kind have been brought under section 7 of the Charter. A recent article discussing this matter cites two such cases, both of which were unsuccessful.[23]

Litigation provides the most visible evidence of the interaction between the Charter and public policy. Court action resulting in the nullification of statutory provisions dramatically underscores the Charter's power. Even unsuccessful court action has the potential to spur governments to amend policies or programmes. Moreover, amendments may be made in anticipation of possible Charter challenges.

---

[21] Peter H. Russell, "Canada's Charter of Rights and Freedoms: A Political Report," 385-86.
[22] Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989). The Council's study includes appeals from lower court decisions and a constitutional reference which resulted from one case. Eliminating such "double counting" yields a lower figure of 21 cases.
[23] Patrice Garant, "Fundamental Rights and Fundamental Justice," in Gerald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms* , 2nd Ed. (Carswell, 1989) 351.

This is difficult to measure, however, in the absence of an explicit acknowledgment to this effect by the government.

In this paper, I study the impact of Charter litigation on the welfare state by examining four challenges to income maintenance programmes. These cases are as follows: *Piercey* v. *General Bakeries* (a challenge to Newfoundland's Workers' Compensation Act),[24] *Silano* v. *B.C. Government* (a challenge to regulations under the B.C. Guaranteed Available Income for Need Act),[25] *Re Phillips* (a challenge to the Nova Scotia Family Benefits Act),[26] and *Schachter* v. *Canada Employment and Immigration Commision* (a challenge to the Unemployment Insurance Act).[27]

It should be noted, first, that all of the cases were brought under section 15 of the Charter. This reflects the importance of this section in the score of Charter challenges which have been launched to date in the area of social welfare policy. Secondly, the cases illustrate two opposing applications of the Charter. The *Piercey* case, on the one hand, illustrates the Charter's potential to curtail or restrict the operation of established social programmes. In that case, the Charter was enlisted to challenge the constitutionality of the statutory bar on employee lawsuits against employers under workers' compensation legislation. While successful in the Newfoundland Supreme Court, the challenge was rejected by the province's Court of Appeal and, ultimately, by the Supreme Court of Canada. The other three cases, on the other hand, illustrate a more common purpose of Charter litigation in this field: namely, to broaden the terms of entitlement of benefit programmes. In these cases, the Charter was enlisted to challenge inequalities in the benefit levels or eligibility criteria of three social programmes. These challenges were successful; consequently, the benefit provisions in question were found to be invalid.

---

[24] (1986) 31 DLR (4th) 373 (Nfld. SCTD)
[25] [1987] 5 WWR 739 (BCSC).
[26] (1986) 27 DLR (4th) 156 (NSSCTD)
[27] (1988) 18 FTR 199 (FCTD).

The Argument

In this paper I argue that the Charter is a potentially important force shaping the development of the welfare state. Its influence, however, cannot be gauged exclusively by reference to court rulings declaring invalid various welfare state provisions. The ultimate effect of such rulings depends on the remedial measures taken by governments to bring their programmes or policies into conformity with the Charter. The precise governmental response, in turn, may be conditioned by a variety of political influences. It is appropriate, therefore, that Charter litigation be viewed in the broad context of Canadian politics and society. Accordingly, in the four cases examined in this study, I describe the nature and purpose of the challenge, the interests at stake, the nature and history of the impugned legislation, the political environment in which the case was launched, the judgment of the court, and, finally, the legislature's response to the court's decision.

Organization

The scheme of this study is as follows. In Chapter 2, by way of further background, I discuss at greater length the debate over the significance of the Charter for the welfare state. The outline of this debate was sketched earlier in this chapter. Chapter 3 deals with the challenge to Newfoundland's Workers' Compensation Act. This case, I argue, represents the most serious use of the Charter to date to curtail or restrict the operation of a major social programme. Chapter 4 discusses the other three cases--cases in which the Charter was sought to be used as an instrument to expand particular benefit programmes. Chapter 5 evaluates the cases while Chapter 6 sets out some concluding observations.

2. Implications of the Charter for the Welfare State

In this chapter I discuss at greater length four broad implications of the Charter for the welfare state. To reiterate, these are the following: the recognition of substantive welfare rights, the use of the Charter as an instrument to curtail or dismantle social programmes, the establishment of procedural welfare rights, and the use of the equality provisions of the Charter to expand the scope of existing social benefits. In the course of this discussion, I identify and discuss briefly several issues which are raised by each of these interpretations. It is beyond the scope of this chapter, however, to draw definitive conclusions about these competing interpretations.

Substantive Welfare Rights

On a cursory reading of its provisions, the Charter has no obvious relevance to the welfare state. Broadly speaking, the Charter represents a codification of traditional political and legal rights, with the notable addition of linguistic and minority language education rights. The "fundamental freedoms" set out in section 2 (generally, freedom of conscience and religion, freedom of speech, and freedom of assembly) are restricted to those historic civil liberties which have long characterized Canadian political practice. The provisions styled "democratic rights" set out a number of essential features of parliamentary government, such as the requirement for annual sittings of Parliament and the right of every citizen to vote in general elections.[1] The provisions styled "legal" rights" (sections 7-14) reiterate or expand legal protections (largely in the criminal law context) which have evolved through centuries of common law decisions and statutory enactments.

---

[1] A number of the "democratic rights" were or are still embodied in the *Constitution Act, 1867* or in ordinary statutes governing elections and voting. For example, the provision in section 4(1) of the Charter establishing a 5-year limit on the life of a Parliament or legislature following a general election already applied to the House of Commons by virtue of sections 91(1) (now repealed) and 50 of the *Constitution Act, 1867*. Section 19 of the *Manitoba Act, 1870* establishes a 4-year limit on the life of a Manitoba Legislature, while statutes enacted by Ontario and Quebec pursuant to section 92(1) of the *Constitution Act, 1867* provide for a 5-year term. Similarly, the provision under section 5 of the Charter for annual sittings of Parliament and the legislatures was previously set out in sections 20 (now repealed) and 86 of the *Constitution Act, 1867* in regard to Parliament and the Legislatures of Ontario and Quebec.

A number of provisions of the Charter reflect more modern concerns, notably egalitarian rights (section 15), multiculturalism (section 27), and sexual equality (section 28). Other provisions reflect the interests of particular groups within Canadian society, notably aboriginal peoples (section 25) and French and English linguistic minorities (sections 16-23). More so than the "traditional" rights referred to above, these provisions of the Charter were conditioned, to a greater or lesser extent, by the politics of patriation. Thus, while the scope of section 15 owes much to the lobbying efforts of feminist organizations, the multicultural rights provision was accepted by the Federal government as a means of reconciling "ethnic" Canadians to the constitutional entrenchment of official bilingualism.

Among the values and interests enshrined in the Charter, "welfare rights" are conspicuously absent. There is no mention of a right to the basic means of physical existence, such as the right to adequate food, clothing, or shelter. Nor are there explicit guarantees of broader social benefits, such as the right to employment, medical care, or the enjoyment of culture. The only constitutional provision which appears even remotely to address these concerns--namely, the provisions regarding "equalization and regional disparities" under section 36 (Part III) of the *Constitution Act, 1982*--lies outside the ambit of the Charter. [2]

---

[2] Under subsection 36(1)(c) Parliament and the legislatures declare their commitment to "providing essential public services of reasonable quality to all Canadians." Under subsection 36(2), a further commitment is made to the principle of equalization payments, "to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

The absence of clear constitutional protections for welfare rights does not itself preclude the possibility of their being read into the Charter by the courts.[3] As noted earlier, many of the rights inscribed in the Charter are vaguely worded and therefore susceptible to a variety of interpretations. Thus, Martha Jackman, for example, argues in favour of an interpretation of section 7 which would guarantee absolutely "an irreducible core of welfare entitlements."[4] Such an interpretation, Jackson contends, is "consistent with longstanding understandings, values, and social traditions in Canada."[5] In her view, there is a "popular consensus...that the state, acting on behalf of the community, has an obligation to guarantee that every Canadian is ensured a decent standard of living as a right of social citizenship."[6]

The idea of judicially mandated welfare rights raises many important political issues. One such issue concerns the nature and durability of the "political consensus" underpinning the welfare state. A related issue is whether there is a sufficiently well-defined and well-accepted social conception of the welfare state which the courts may identify and give effect to. This is a matter of some controversy. It seems clear, however, that while the traditional civil and political rights inscribed in the Charter have long since been accepted as essential characteristics of Canadian liberal democracy, there is rather less agreement about the nature and extent of the state's obligation to guarantee the social and economic needs of Canadians.

---

[3] R.A. Macdonald, however, argues that the courts seldom read into a constitutional document rights which have not been expressly stated. "[O]nce a text has crystallized, it will inhibit the development, assertion and recognition of non-stipulated rights." "Postscript and Prelude--the Jurisprudence of the Charter: Eight Theses" *Supreme Court Law Review* 4 (1982) 325. He goes on to note that despite the apparent breadth of the original ten amendments to the U.S. Constitution, it was still necessary to introduce more explicit amendments to protect civil liberties.

[4] Martha Jackman, "The Protection of Welfare Rights under the Charter" *Ottawa Law Review* 20:2 (1988) 305.

[5] *Ibid.*, 282.

[6] *Ibid.*, 282-83.

It is widely accepted that in the quarter-century following the Second World War, broad political agreement emerged in Canada and in other western countries about the desirability of, and, indeed, necessity for, various welfare state provisions. During this period, the welfare state was seen to complement the market economy. As Keith Banting puts it:[7]

> [I]t would be an instrument of automatic countercyclical stabilization, it would ensure an educated and healthy workforce, and it would provide the complex social infrastructure essential to an urban economy.

The welfare state was also, of course, shaped by other forces, including pressure by organized labour and by a heightened moral commitment to "social justice" in general.[8] Nevertheless, as some observers caution, it is easy to exaggerate the degree of political support in Canada for the building of a comprehensive social security system, even during the prosperous decades of the 1950's and 1960's. As Alan Cairns and Cynthia Williams point out, the welfare state was introduced in an *ad hoc* fashion and was conditioned by the complexities of the federal division of powers.[9] They further observe that "no articulate social philosophy guided its early development and subsequent consolidation."[10] As a result, the "social rights" to which the welfare state gives expression exist in an ill-defined and, in many respects, antagonistic relationship with the self-regarding individualism of a predominantly free market economy and with the capital accumulation requirements of such an economy.[11]

---

[7] Keith Banting, *The Welfare State and Canadian Federalism* , 2nd ed. (McGill-Queen's University Press, 1987), 185.

[8] The latter commitment is reflected in, among other things, the adoption of the U.N. Universal Declaration of Human Rights in 1948. This document proclaims numerous social and economic rights, including the right to adequate food, clothing, medical care, and social security.

[9] Alan Cairns and Cynthia Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview" in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 16.

[10] *Ibid.*

[11] *Ibid.*, 19.

Underlying tensions between the claims of the welfare state and those of the market have been thrown into sharper relief in recent years by recurrent economic difficulties in Canada and other western countries. Inflation, unemployment, and government deficits have brought into question many of the economic assumptions underpinning the welfare state. The adoption of neo-conservative policies in the 1980's reflected , in Keith Banting's words, a revival of "older conceptions of a fundamental incompatibility between economic efficiency and social equity."[12] Thus, while important social programmes such as Medicare and old age pensions have remained largely untouched, it is significant that there has been no major expansion of the income security system since the late 1970's[13]--this despite evidence of a rising incidence of poverty among such groups as single-parent families and the elderly. At the same time, as Ramesh Mishra points out, there has been a dismantling of certain elements of the broader "Keynesian welfare state" in several western countries, most notably an abandonment of the commitment to full employment.[14]

The problematic nature of judicially mandated social benefits is further underscored by the fact that even among the most ardent supporters of the welfare state, there is apparently little support for the constitutionalization of social benefits. It is true that a number of organizations appearing before the Special Joint Committee on the Constitution in 1980-81 did call for the entrenchment of such rights.[15] These calls, however, were few and far between. More interesting was the failure of the New Democratic Party and of organized labour to seek the inclusion of welfare rights in the

---

[12] Keith Banting, *The Welfare State and Canadian Federalism*, 185.

[13] *Ibid.*, 187.

[14] Ramesh Mishra, *The Welfare State in Capitalist Society* (Toronto: University of Toronto Press, 1990) 97.

[15] A brief submitted by the United Church of Canada called for the recognition of a right to work, housing, and a minimum income. Similar appeals were made by the National Anti-Poverty Organization, the Canadian Council on Social Development, and the Vancouver People's Law School Society. See Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (29A: 12-18).

Charter. Both groups, after all, played an important and often decisive role in shaping the modern Canadian welfare state. Moreover, they remain persistent advocates of a more extensive and generous social welfare system. Nevertheless, the only concession to "social and economic rights" which the NDP actively sought was the demand that property rights be excluded from the Charter. Such rights, the Party feared, could be used to constrain the state's ability to pursue interventionist economic policies. The labour movement, for its part, was largely absent from the patriation debate.[16]

A number of observers have expressed surprise at the NDP's failure to demand the inclusion of welfare rights in the Charter.[17] Such observations presume there to be a settled view on the left about the desirability of constitutionalizing the welfare state. Yet this is far from being the case. Many socialists and trade unionists are deeply distrustful of the judiciary. Historically the common law has been much more hospitable to the interests of capital than to those of workers and trade unions. Moreover, all of the important social reforms of the modern era, from the recognition of collective bargaining to the establishment of social programmes, have emerged not from "landmark" court decisions but from legislative enactments resulting from the political process. Given the role of the judiciary in Canada and in the United States in stymieing the introduction of "New Deal" legislation in the 1930's, the idea of making judges the principal custodians of the welfare state still strikes many as ironic.[18]

---

[16] The Canadian Labour Congress remained silent for fear of alienating Quebec's nationalist labour movement. See Reg Whitaker, "Democracy and the Canadian Constitution" in Keith Banting and Richard Simeon, eds., *And No One Cheered* (Toronto: Methuen, 1983) 255.

[17] Reg Whitaker, "Democracy and the Canadian Constitution," 240; Christine Sypnowich, "Constitutional Change and the Malaise of the Canadian Welfare State" (Paper prepared for Canadian Political Science Meetings, 1984)

[18] Charles Campbell, "The Canadian Left and the Charter of Rights," in Robert Martin, ed., *Socialist Studies: Critical Perspectives on the Constitution* (Winnipeg: Society for Socialist Studies, 1984) 30-44.

A broader issue raised by the call for the constitutional recognition of substantive welfare rights concerns the appropriate limits of judicial policy-making. By imposing on the state a positive constitutional duty to provide specified social benefits, the courts would assume a role in determining the allocation of significant social resources among competing ends--a function that is today the exclusive responsibility of the legislature. The assumption of such a role by the judiciary would raise important questions about the nature of democratic politics and responsible government in Canada. A related concern is the institutional capacity of the courts to make far-reaching social policy decisions. These and other questions inform a larger debate about the implications of recognizing social and economic rights as "human rights." Some observers, such as Maurice Cranston, contend that, unlike civil and political rights, social and economic rights lack the necessary attributes of rights. Others insist that the difference between the two sets of rights is one of degree, not kind.[19]

It is beyond the scope of this chapter to identify all of the issues relevant to the debate over welfare rights. Suffice it to say that the debate is contentious and continuing. For that reason, judicial recognition or denial of welfare rights in future Charter litigation can be expected to generate controversy.

Erosion of Social Programmes

Rather than serving to consolidate or expand the frontiers of the welfare state, the Charter may conceivably serve precisely the opposite purpose. This view is advanced by a number of observers who contend that the text and tenor of the Charter are substantially at odds with the precepts and assumptions underpinning the welfare state. According to this view, the central preoccupation of the Charter is the protection of individual liberty against unwarranted incursions by the state. The welfare state, on the other hand, envisions an active and beneficent role for the state. The state is regarded not so much as a potential source of tyranny, but as a tool for enhancing the quality of life of significant numbers of people.

---

[19] For a concise outline of this debate, see C. Michael MacMillan, "Social versus Political Rights," *Canadian Journal of Political Science*, 19:2 (June 1986) 283-303.

Because of the perceived incompatibility of the Charter with the welfare state, numerous observers fear that the Charter may be used as a constitutional battering ram to knock down the legislative edifice of social programmes. Roy Romanow, former Attorney General of Saskatchewan and a member of the "kitchen cabinet" which helped pave the way to the political acceptance of the patriation package, has belatedly warned of the Charter's [20]

> potential for trumping our society's great social programs, such as Medicare, by its unrelenting focus on individual claims, in the pursuit of individual rights and in oversight of the demands of justice as a whole.

Allan Hutchinson and Andrew Petter echo this view, describing the Charter as a "constitutional affirmation of liberal faith. . . .arm[ing] individuals with a negative set of formal rights to repel attempts at government interference."[21]

According to this critique, there are important differences between the Charter and the welfare state in terms of the interests which each seeks to protect. The Charter, on the one hand, proclaims the right of individuals to be free from coercive interference by the state. This conveys a negative conception of liberty: that is, the idea that liberty consists in the absence of external restraint. More specifically, the Charter expresses an exclusive concern with restraints imposed by the state, rather than more generalized restrictions resulting from social and economic relations. The welfare state, on the other hand, reflects a positive conception of liberty. This stresses the removal of a wider range of barriers to individual autonomy, including economic disadvantage. Unlike its negative cousin, positive liberty is secured not only by the absence of external interference, but also by the provision of social benefits such as job-training allowances and subsidized daycare. Such social benefits expand the area of effective choice available to individuals.[22]

---

[20] Roy Romanow, "And Justice for Whom?" *Manitoba Law Journal* 16:2 (1986) 105.

[21] Allan C. Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" *University of Toronto Law Journal*, 38 (1988) 283.

The Charter's preoccupation with abuses of state power is reflected first and foremost in the application section of the Charter (section 32) which essentially limits the Charter's reach to a review of governmental action. Although this provision was originally thought by numerous legal scholars to be sufficiently broad to embrace private law relations, the courts have chosen to construe it narrowly. As a result, the Charter may only be invoked to curtail abuses committed by governments (federal, provincial, and municipal) and by various bodies exercising governmental authority such as hospital boards, community colleges, and certain crown corporations.[23]

Critics contend that the Charter's focus on governmental power reflects a belief that the principal threat to freedom stems not from inequalities in the distribution of wealth and power in society but from the state.[24] They point out that "the state is not the only centre of power in our society capable of restricting freedom or equality or of abusing rights."[25] Tenants evicted by landlords without just cause or workers laid off during a period of high unemployment are no less the victims of arbitrary power than are those who have suffered at the hands of government. The welfare state, in contrast, is concerned with protecting individuals against the vagaries of the free market. In tandem with the increasing role of the state, directly and indirectly, in managing the economy, the welfare state reflects the modern view that unbridled economic freedom is both technically and morally undesirable.

---

[22] See generally Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford University Press, 1960), 118-172 and Lawrence Crocker, *Positive Liberty* (The Hague: Martinus Nijhoff, 1980).

[23] Roger Tasse, "Application of the Canadian Charter of Rights and Freedoms" in Gerald-A. Beaudoin and Ed Ratushny, eds.,*The Canadian Charter of Rights and Freedoms* (Carswell, 1989) 65-126. It should be noted that human rights legislation enacted in all of the provinces and at the federal level guarantees certain rights in both the public and private sectors. However, such legislation is more restrictive than the Charter. Generally speaking, it prohibits discrimination in the provision of accommodation, hiring and employment, and the provision of benefits customarily available to the public.

[24] Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda", 857.

Critics such as Patrick Monahan reject the contention that the Charter ignores the legitimacy of public policies which advance collective interests at the expense of individual rights. As Monahan points out, numerous Charter provisions recognize that the limitation of certain rights may expand the freedom of others.[26] Thus, section 15(2) sanctions public policies which discriminate in favour of disadvantaged individuals and groups. Section 6(4) permits the establishment of employment programmes which grant preferential treatment to provincial residents where the province's unemployment rate exceeds the national average. More generally, section 1 subjects all Charter rights to "such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society."[27] Hutchinson and Petter reply that these provisions are expressed as qualifications of Charter rights. That is to say, they are exceptional in nature and "may occasionally serve as brakes on the full expression of Charter rights."[28]

---

[25] Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" *Canadian Bar Review* 61 (1983) 50.

[26] Patrick Monahan, *Politics and the Constitution*, 116.

[27] Monahan adds that the exclusion of certain rights from the Charter, notably property rights, further strengthens the Charter's "communitarian" character.

[28] Allan C. Hutchinson and Andrew Petter, "Private Rights/Public Wrongs", 283.

If the the Charter predominantly reflects the philosophy of individual rights and limited government, it arguably lends itself to individuals and groups seeking to challenge public policies (including social programmes) which can be shown, or at least plausibly argued, to infringe individual freedom in one way or another. Does this mean that such challenges will necessarily succeed? Interestingly, even critics of the Charter are unwilling to predict the sudden elimination of social programmes through Charter litigation. Andrew Petter, for example, concedes that "[t]he political costs of doing so are, thankfully, too great for the courts to contemplate."[29] This observation implies that the courts are conscious of the limits of their political legitimacy. Such a view is often supported by reference to the U.S. Supreme Court's historic confrontation with President Roosevelt over the New Deal. In thwarting the introduction of urgent social and economic reform, the Court found itself sharply out of step with the prevailing mood of public opinion--a fact that was confirmed by Roosevelt's overwhelming re-election in 1936. Faced with an unprecedented plan to pack the bench with judges known to be supportive of the New Deal, the Court was obliged to back down, whereupon it proceeded to reverse several of its earlier decisions.[30] The Court, in short, "was not only defeated by Franklin Roosevelt--it was routed."[31]

The battle over the New Deal arguably underscores the dangers awaiting a judiciary which defies a determined democratic majority. However, as Robert Dahl points out, this episode was highly exceptional. In his study of the U.S. Supreme Court, Dahl concludes that the Court inevitably (if not immediately) upholds the major policies of the "dominant law-making alliance." He argues that there are two key reasons for this. First,[32]

---

[29] Andrew Petter, "Immaculate Deception," 859.
[30] This was signalled by the crucial "switch" by Justice Roberts in *West Coast Hotel* v. *Parrish* 30 US 379 (1937). In subsequent decisions the Court ceased to apply "substantive due process" in the field of economic regulation. See Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986).
[31] *Ibid.*, 178.

> ...the more active the Court is in contesting the policies of law-making majorities, the more visible becomes the slender basis of its legitimacy according to democratic standards, and the greater the efforts will be to bring the Court's policies into conformity with those enacted by law-making majorities.

Secondly, he points out that the normal process of retirement from the bench ultimately permits a new law-making aliance to appoint justices to the Court which reflect its views on major issues of public policy.[33]

Assuming that courts adapt to, and ultimately come to reflect, dominant social and political values, immediate prospects for the judicial "repeal" of social welfare legislation under the Charter are virtually nil. After all, the welfare state in Canada is more extensive than that in the United States and enjoys broader popular support. On the other hand, it may be argued that the existence of the notwithstanding clause may make Canadian judges less reluctant to strike down popular legislation than they otherwise would be. According to this view, section 33 protects the courts from direct attack by the legislature by "afford[ing] political leaders disgruntled with judicial decisions a more civilized remedy than court-bashing or court-packing."[34] It seems unlikely, however, that the mere existence of section 33 would cause the courts to disregard entirely the political implications of their decisions. After all, the routine use of section 33 by the legislature would very quickly undermine public confidence in the courts and respect for their rulings.

---

[32] Robert A. Dahl, *Democracy in the United States: Promise and Performance*, 3rd Ed. (Chicago: Rand McNally) 240.
[33] *Ibid.*, 238.
[34] Peter H. Russell, "Canada's Charter of Rights: A Political Report," 399.

Expansion of Procedural Rights

A third implication of the Charter for the welfare state is its potential to expand rights of appeal available to individual welfare recipients whose benefits are reduced or terminated. Such procedural welfare rights would be effected under section 7 of the Charter, which guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[35] While the elements of "fundamental justice" cannot be predicted with certainty, they would likely include such matters as the right of a recipient to be informed of the reasons for the reduction or termination of benefits and the right to an independent and impartial hearing.

Among other things, the recognition of procedural welfare rights would impose a degree of uniformity on appeal procedures which vary considerably from province to province. Under the Canada Assistance Plan, the federal government provides 50% of the costs of provincial (including municipal) social assistance spending. Among the few conditions attached to the provision of federal moneys, the Act requires provinces to provide "a procedure for appeals from decisions. . . with respect to applications for assistance or the granting or providing of assistance."[36] While all of the provinces have established appeal procedures of some description, their adequacy has never been seriously scrutinized by Ottawa. Yet as early as 1971 concerns were being expressed about the nature of these appeal procedures. The Special Senate Committee on

---

[35] See generally Ian Morrison, "Security of the Person and the Person *in Need: Section Seven of the* Charter and the Right to Welfare," *Journal of Law and Social Policy* 4 (1988) 1; Ian Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare," *University of Toronto Faculty of Law Review* 46:1 (1988) 1.

[36] R.S.C. 1985, c.C-1, s.6(2)(e).

Poverty, for example, made the following observations:[37]

> Generally speaking, appeal boards seem to be treated as extensions of provincial welfare departments, and not in any way as independent entities. They are naturally geared to act in the interests of the welfare system, and not in the interests of the welfare recipient.

More recently, an Ontario Government review committee observed that the province's appeal procedures "violate basic notions of fairness and due process."[38] Specifically, the Committee cited a frequent failure to provide notice of or reasons for important decisions affecting recipients. It also noted that recipients are denied access to information relevant to their case.

In many provinces, benefits are cancelled before the appeal process has been exhausted. In others, the claimant is obliged to apply for interim benefits pending appeal. The former situation is illustrated by the Nova Scotia case of *Re Rafuse and Hambling*[39] In that case, a woman who had been receiving welfare benefits for some time was given verbal notice that in the opinion of a social worker she was cohabiting with her allegedly estranged husband and therefore no longer eligible for benefits under the Family Benefits Act. Her benefits were cancelled that same day, without her having been given an opportunity to make representations to welfare officials. An application to the Nova Scotia Supreme Court to quash the decision was rejected by the court, which held that the woman's interests were adequately protected by her post-termination right of appeal.

Ian Johnstone has argued for an interpretation of section 7 which would guarantee a hearing to individuals in receipt of social assistance before such assistance may be properly suspended or terminated.[40] Such a right, he underscores, would not impose a general obligation on the state to provide social assistance; it would merely guarantee that where the state undertakes to provide such assistance, it must adhere to certain procedural requirements before withdrawing it.

---

[37] *Poverty in Canada: Report of the Special Senate Committee on Poverty* (Ottawa: Information Canada, 1971) 88.

[38] *Transitions: Report of the Social Assistance Review Committee* (Toronto: Queen's Printer, 1988) 18.

[39] (1979) 107 D.L.R. 349 (NSSCTD).

The recognition of procedural welfare rights would represent an important consolidation of the welfare state. Yet it would hardly constitute a radical development. In the United States, the Supreme Court has held that individuals receiving public assistance have a constitutional right to a hearing before their benefits may be terminated.[41] In recognizing such a right, the court characterized welfare benefits as a new species of property interest and therefore subject to the due process clauses under the Fifth and Fourteenth Amendments to the US Constitution. While property rights were expressly excluded from the Canadian Charter, Johnstone argues that the phrase "security of the person" in section 7 conveys more clearly the idea of personal autonomy and integrity which underpins the US court's "new property" analogy.[42]

It should also be noted that even before the advent of the Charter, the courts in Canada were beginning to establish a wider duty of procedural fairness in the field of administrative decision-making. Thus, in recent years the courts declared a probationary police constable to be entitled to notice and a hearing prior to being terminated.[43] Inmates of federal penitentiaries facing internal disciplinary proceedings were also held to be entitled to fair procedures, reviewable by the Federal Court.[44]

---

[40] Ian Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare," 46.
[41] *Goldberg* v. *Kelly* 397 US 254 (1969)
[42] Ian Johnstone, "Section 7 and Constitutionally Protected Welfare," 22.
[43] *Nicholson* v. *Haldimand-Norfolk Police Commr. Bd.* [1979] 1 SCR 311, 88 DLR (3d) 671.
[44] *Martineau* v. *Matsqui Institution Disciplinary Bd. (No. 2)* (1979) 106 DLR (3d) 385 (SCC).

The practical significance of procedural welfare rights should not be overstated. Being merely procedural in nature, such rights would not oblige governments to provide benefits which they have chosen not to provide. Nor would they prevent governments from legislating cut-backs in social programmes or eliminating them altogether. Indeed, at a time when governments are attempting to limit increases in social spending, there may be a temptation to divert funds away from substantive benefits to cover the administrative costs of judicially mandated appeal procedures. [45] It should be noted, finally, that the effectiveness of new avenues of appeal would depend to a large extent on adequate publicity and the availability of legal or para-legal assistance to welfare recipients. Legal rights, after all, are not self-enforcing. Moreover, welfare recipients are frequently ill-equipped to defend their interests effectively.

Equality Rights

A fourth implication of the Charter for the welfare state arises from the equality provisions in section 15. Specifically, the right of everyone to "equal protection and equal benefit of the law without discrimination" may be used to prohibit the state from denying various groups the right to the equal enjoyment of social benefits. Section 15 may therefore serve as an instrument for assuring that welfare state benefits are allocated to the widest class of eligible recipients on an equal, non-discriminatory basis.

This interpretation reflects the clear intention of those groups which lobbied in 1980-81 for the particular phrasing found in section.15. Women's groups in particular sought a wider equality provision than that set out in the Bill of Rights of 1960[46] because of the unhappy results of two notable cases brought pursuant to the Bill of Rights. In the first of these, *A.G. Canada* v. *Lavell*,[47] two women challenged a section of the Indian Act under which Indian women who married non-Indians lost their Indian status, whereas Indian men who married non-Indians retained their Indian status. They argued that the section constituted discrimination on the basis of sex. The Supreme Court of Canada, however, upheld the Act, ruling that the right to equality before the law only guaranteed equality in the administration of the law, not in the substance of the law. Accordingly, "as long as Indian women were treated in the same discriminatory way, there was no violation of the Canadian Bill of Rights."[48]

---

[45] Ian Johnstone, "Section 7 and Constitutionally Protected Welfare," 41.

The second case, *Bliss* v. *A.G. Canada* ,[49] involved a challenge to the Unemployment Insurance Act. The Act drew a distinction between maternity benefits and regular benefits, imposing strict eligibility criteria on the former. By denying pregnant women access to regular unemployment benefits, women's groups claimed that the Act denied the right of equality before the law on the basis of sex. The Supreme Court rejected this claim, ruling that the Act did not discriminate against women as such because not all women become pregnant.

In contrast to the courts' narrow construction of the equality provisions of the Bill of Rights, section 15 of the Charter was expressly designed to guarantee equality in the content of the law. With respect to social welfare legislation, section 15 was widely predicted to "require that conditions of entitlement to benefits be prescribed on an equal basis."[50] In this way, the Charter was expected to facilitate an expansion, or at least a restructuring, of the welfare state by requiring programmes to be more broadly inclusive.

---

[46] S.1(b) of the Bill of Rights guarantees "equality before the law and protection of the law without discrimination" on certain specified grounds.

[47] [1974] SCR 1349.

[48] Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) 14.

[49] [1979] 1 SCR 183.

As is evident in the cases discussed in Chapter 4, the courts to date have indeed given effect to this interpretation of section 15. I shall therefore discuss the significance of section 15 in the context of those cases.

This, then, concludes the overview of four broad implications of the Charter for the welfare state. The following chapters consider the use of the Charter in four cases relating to welfare state legislation.

---

[50] Anne F. Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Carswell, 1985) 22.

3. Workers' Compensation and the Charter

Introduction

In July, 1985 Mrs. Shirley Piercey commenced an action in the Newfoundland Supreme Court challenging the constitutional validity of a key section of the province's Workers' Compensation Act. Invoking section15 of the Charter of Rights and Freedoms, Mrs. Piercey alleged that the statutory abolition of a worker's common law right to sue his employer for injuries sustained during the course of employment constituted discrimination and was therefore invalid. The Trial Court accepted this contention in a decision delivered in September, 1986.[1]

While earlier Charter challenges to workers' compensation had been brought in other provinces, the *Piercey* case was the first such challenge to be accepted by a provincial superior court.[2] The immediate effect of the Newfoundland Court's ruling was to throw into question the validity of workers' compensation schemes across the country, the terms of which are substantially the same. As a result, the case attracted considerable national attention. Although the substance of the Trial Court's ruling was rejected by the Newfoundland Court of Appeal in October, 1987, the issue was not definitively resolved for a further eighteen months when the Supreme Court of Canada unanimously affirmed the validity of the legislation.

This case is significant for several reasons. First , it represents an early attempt to use the Charter to curtail the scope and operation of a major social programme. It therefore provides an important indication of the Charter's potential to roll back the welfare state. Secondly, the nature of the challenge emphasizes the conflict between individual rights and collective rights--a conflict which underpins many, if not most, Charter challenges to legislation. In this case, the conflict involves, on the one hand, a socialized approach to the settlement of industrial accident claims and, on the other hand, an individualized assessment of the merits of each claim through the judicial process. Thirdly, as I will argue at length later, the case illustrates the extent to which the Charter has "judicialized politics and politicized the judiciary," to use Peter Russell's apt phrase.[3] This point is underscored by the sweeping policy implications of the rights asserted in the case under the auspices of the Charter. It is also borne out by the intervention in the case of numerous interest groups anxious to ensure that the courts reached the "right" decision.

---

[1] *Piercey* v. *General Bakeries Ltd.* (1986) 31 DLR (4th) 373 (Nfld. SCTD).

[2] It should be noted, however, that a provision of the Alberta Workers' Compensation Act was struck down by the province's Court of Queen's Bench in *Budge* v. *Workers' Compensation Board (Alberta), No. 2* (1987) 80 A.R. 207. *Budge* is narrower than *Piercey* in that the Alberta court only struck down the bar on lawsuits against employers other than the worker's own employer. This does not materially affect the scheme of the Act.

In this chapter, I describe the details of the case and its progress through the courts. In doing so, I attempt to take a broad view of the case. Thus, in addition to setting out the arguments advanced by the courts and litigants involved, I also describe the history of workers' compensation legislation, the interests it serves, and the role played in the case by groups representing those interests. I begin with a discussion of the origins and nature of workers' compensation legislation in Canada.

---

[3] Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" *Canadian Bar Review* 61 (1983) 51-52.

Origins of Workers' Compensation

An inevitable consequence of the increasing mechanization of production in Canada in the late 19th century was a marked increase in the incidence of death and injury resulting from industrial accidents. In Ontario, Canada's most industrialized province, trade unions began to agitate in the 1870's for legislation regulating working conditions. These efforts bore fruit in 1884 with the passage of the Factories Act, which limited working hours, required the use of safety equipment, and restricted child labour.[4] Designed to reduce the risk of occupational injury, the Act did not address the economic needs of injured or disabled workers and their families. During this period, the only means available to workers to secure compensation for work-related injuries was to sue their employer for damages. Litigation, however, was not a promising avenue for most workers. While the cost of legal action prevented many workers from pursuing a claim, those who did stood little chance of success because of three formidable defences fashioned by the courts to shield employers from liability for industrial accidents. The defences of contributory negligence, common employment, and voluntary assumption of risk precluded recovery by workers where it could be established that "the victim was in any way responsible for the accident, or that the accident was caused by the actions of a fellow employee, or that the accident resulted from one of the normal or assumed risks of the particular job."[5]

In 1886, Ontario took a limited though important step to curtail the anti-worker bias of the common law by enacting legislation which restricted the application of the

---

[4] Dennis Guest, *The Emergence of Social Security in Canada* (Vancouver: UBC Press, 1980) 40.
[5] *Ibid.*, 39.

the defences of common employment and assumption of risk.[6] In his study of workers' compensation cases brought in the courts of Ontario in the late 19th century, Professor Risk shows that this statutory broadening of employer liability improved the success rate of workers in such cases. By the late 1890's, he records that workers were successful in over half of the appeal cases brought before the Divisional Court.[7]

Nevertheless, the majority of injured workers continued to receive little or no compensation. Moreover, with the significant expansion of industrial activity in the early 1900's, the incidence of workplace injuries became more acute. As a result, trade unions became more insistent about the need for a workers' compensation scheme.[8] In Ontario, the Whitney Government responded to this pressure by establishing a royal commission headed by Sir William Meredith, Chief Justice of the Court of Common Pleas.

Ontario industrialists were initially hostile to the principle of workers' compensation, which they considered to be a costly extravagance. However, following the establishment of the Meredith Commission, they quickly realized its economic benefits. Indeed, while businessmen opposed labour on specific details, notably labour's demand that the scheme be wholly financed by employers, Michael Piva maintains that by 1911 they were almost unanimously in favour of the principle of workers' compensation.[9] The principal reason for this was the uncertainty and growing cost of litigation. From industry's perspective, workers were winning a disconcerting number of large damage awards, thanks both to the statutory enlargement of employer liability and to a narrower reading by the courts of the employer's traditional common law defences.[10] In contrast to the judicial lottery, workers' compensation would make accident payments regular and predictable. Moreover, because all employers would be required to participate, there would be no loss of competitive advantage.[11]

---

[6] The legislation, misleadingly styled *The Workmen's Compensation for Injuries Act*, was modelled on the English statute of 1880. Despite its name, it was not a compensation scheme. It merely expanded the scope of employers' liability at common law.

[7] R.C.B. Risk, "'The Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in David H. Flaherty, ed., *Essays in the History of Canadian Law* , Vol. 2 (Osgoode Society, 1983) 432.

[8] Canadian trade unions were undoubtedly emboldened in this regard by the adoption of workers' compensation legislation in Britain in 1897 and in most American states between 1902 and 1920.

[9] Michael J. Piva, "The Workmen's Compensation Movement in Ontario,"*Ontario History* 67:1 (1975) 47.

Meredith's recommendations, submitted in 1913, were accepted by the Government and enacted a year later. Broadly speaking, the Ontario plan provided for the establishment of a compensation fund, administered by a provincial board, from which workers would be entitled to claim benefits for injuries "arising out of and in the course of employment." The plan was to be financed exclusively by employers and operate on a no-fault basis. In exchange for the assured provision of compensation benefits, workers would lose the right to sue their employer for damages. This exchange is widely referred to as the "historic trade-off."

A notable feature of the Ontario plan is the degree to which it accommodated the demands of business and labour. For labour, the scheme provided for the guaranteed payment of accident benefits with a minimum of delay. While the level of cash benefits fell short of labour's aspirations, this was offset by the fact that, unlike the English Act, the plan was to be wholly financed by employers. Employers, for their part, were successful in their call for a state-run delivery system which , they believed, would incur lower administrative costs than a system of private insurance. More importantly, the statutory bar on civil actions arising from workplace accidents provided employers with effective security against potentially ruinous damage awards.

---

[10] Barbara R. Bluman, "The Workers' Compensation System--A Modern Perspective," *The Advocate* 45 (1987) 391.
[11] R.C.B. Risk, "'The Nuisance of Litigation'", 462.

The Ontario plan represented a uniquely Canadian response to the problem of industrial injuries compensation, incorporating elements of workers' compensation plans then in place in England, Germany, and the United States. The lynchpin of the Ontario plan was the "trade-off" by workers of their right to take legal action against employers in exchange for the benefits of the Act. In contrast to other elements of the plan--notably, the details of its financing--the statutory bar to civil actions was not widely discussed during the hearings of the Meredith Commission. Professor Risk surmises that this reflected "the extent of dissatisfaction with the courts and [the principle of] fault."[12] In any event, labour evidently considered it to be a fair exchange. Indeed, the Ontario plan proved to be a popular model for the rest of the country and was ultimately adopted, in substantially similar terms, by all of the provinces and both of the territories. Newfoundland's Workmen's Compensation Act was passed in 1951.

The Charter Challenge

Before the advent of the Charter, the statutory bar on civil suits was an unquestioned and seemingly unassailable feature of workers' compensation legislation in Canada. Indeed, subject to the requirements of the BNA Act, Parliament and the Legislatures had the power to curtail or extinguish any common law rights. The Charter, however, created a new basis on which to challenge the validity of any such action.

---

[12] *Ibid.*, 464.

Within this new constitutional framework, Mrs. Piercey launched her assault on Newfoundland's Workers' Compensation Act. Widowed in 1984 when her husband was killed in an accident at the bakery where he was employed, Mrs. Piercey sought damages from the company, General Bakeries Ltd., on grounds of negligence. The company responded by raising section 32 of the Act, the terms of which read as follows:

> s.32(1) The right to compensation provided by this Act is in lieu of all rights and rights of action, statutory or otherwise, to which a worker or his dependents are or may be entitled against an employer or a worker by reason of any injury in respect of which compensation is payable or which arises in the course of the worker's employment.
>
> (2) A worker, his personal representative, his dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.
>
> (3) No action lies for the recovery of compensation under this Act and all claims for compensation shall be determined by the Commission.

The company also invoked section 34 of the Act, which confers on the Workers' Compensation Commission exclusive authority to determine whether an action brought by a worker or his dependents against an employer is prohibited under the Act. Mrs. Piercey contended that these provisions contravened her rights under section 15 of the Charter. Specifically, she contended that she could "not have equal protection and equal benefit of the law without discrimination if she and people in her class [were] denied the right to litigate in the courts of the land."[13]

A preliminary objection raised at the trial was that Mrs. Piercey could not rely on section 15 of the Charter because her husband had been killed before that provision came into effect.[14] As section 15 was not intended to have retrospective effect, it was argued that Mrs. Piercey had no cause of action and thus was precluded from proceeding. Notwithstanding this objection, all of the parties represented before the court (including the Province and the provincial Workers' Compensation Commission) urged the court to rule on the constitutionality of the impugned sections of the Act. Accepting these arguments, Mr. Justice Hickman dismissed Mrs. Piercey's claim but agreed to address the Act's constitutional validity.

---

[13] Per Hickman, CJTD, 31 DLR (4th) 373 at 378.

Despite its importance, the judgment is remarkably brief. In it, Hickman accepts Mrs. Piercey's contention that the workers' compensation regime violates section 15 of the Charter. In so doing, he reads into the Charter a right of "access to the courts," which right may only be abridged, in the language of section 1 of the Charter, by "such reasonable limits prescribed by law as may be demonstrably justified in a free and democratic society." Dismissing the Workers' Compensation Commission as an inadequate substitute for the courts, Hickman launches into a grandiloquent tribute to the judiciary, which he refers to as "the guardian of liberty and freedom of all Canadians."[15] "The courts," he writes, "stand between the would-be oppressor and the intended victim; between the Crown and the accused, between the state and the individual and between the tortfeasor and the sufferer."[16] The courts, moreover, are "free and totally independent of Parliament" and possess the "machinery, power, and legal skills [necessary] to guarantee any citizen the rights enshrined in section 15." Statutory tribunals, in contrast, lack these attributes and are mere instruments for "carrying out the will of the Legislature."[17]

---

[14] Proclamation of section 15 was delayed until 17 April 1985 to permit Parliament and the Legislatures to conduct a review of legislation thought likely to be inconsistent with the new equality provisions.

[15] (1986) 31 DLR (4th) 373 at 384.

[16] *Ibid.*

[17] *Ibid.*

Hickman is equally unyielding in assessing whether the scheme of the Act constitutes a reasonable limitation on section 15 rights. While allowing that the benefits of the Act are "salutary" and represent a "reasonably satisfactory response" to the needs of an advanced industrial society, he questions whether the provision of these benefits necessitates the denial of a worker's right of access to the courts. Concluding there to be no such necessity, he notes that under the British workers' compensation scheme, workers have retained the right to pursue a tort action against their employer. Without acknowledging other differences between the Canadian and British systems, Hickman implicitly calls for a re-structuring of the Canadian scheme to permit workers to sue negligent employers.

Impact of the Trial Court Decision

In declaring the statutory bar to civil actions to be unconstitutional, the Newfoundland Supreme Court struck a blow to a central pillar of one of Canada's oldest pieces of social legislation. In so doing, it dramatically underscored the power and scope of the Charter in the hands of an activist judiciary. While it was unclear whether the Court's decision would be adopted by courts in other provinces (or even, for that matter, by Newfoundland's Court of Appeal), it held out the prospect of a significant re-structuring of workers' compensation in Canada. No less significant were the wider implications of such a re-structuring, for employers, for workers, and for industrial relations in general.

Before discussing the practical implications of the Court's ruling, it is worth noting that the decision emphasizes the possibilities opened up by the Charter for challenging social programmes which infringe "individual rights." In this instance, the

Court does not question the legislature's right to establish a no-fault compensation scheme. It merely declares that in establishing such a scheme, the legislature may not abolish a worker's right to bring an action against an employer. The Court therefore envisions a fusing together of two very different approaches to the settlement of occupational injury claims--on the one hand, a comprehensive, standardized system of compensation and rehabilitation and, on the other hand, an individualized, litigious assessment of legal liability and damages.

By reading into the text of the Charter a constitutionally protected "right of access to the courts" the Court recognizes the right of an aggrieved individual to demand redress before the courts from an alleged wrongdoer. In the case of occupational injuries, this implies the right of workers to sue their employer and, upon proof of liability, to recover damages for the full extent of their loss. This adversarial approach to the settlement of accident claims is entirely at odds with the philosophy of a social insurance scheme such as workers' compensation. In the latter case, the economic loss resulting from a designated risk (whether unemployment, sickness, or occupational injury) is borne not by the individual but by the community through the payment of taxes, premiums, or a combination of the two. Moreover, compensation is awarded as of right.

One of the "costs" of workers' compensation from the point of view of the individual claimant is the relative degree of uniformity it imposes in terms of the level of cash benefits available and in terms of the claims process itself. Under workers' compensation, benefit levels are pegged at a fixed percentage of a workers' average earnings, subject to an absolute maximum. Damage awards, in contrast, are tailored to compensate a victim for the actual loss he has sustained as a result of the defendant's breach of duty. [18]

In addition, under workers' compensation, all claims are made against the workers' compensation fund, rather than against individual employers. As a result, an injured worker is denied the opportunity that a trial would afford of calling the employer to account for his conduct. The worker is thereby denied the satisfaction of seeing that "justice is done" to an employer whose conduct is deemed to fall below accepted standards.

In principle, workers' compensation is not incompatible with the exercise by workers of a right to take legal action against employers for workplace injuries. Indeed, because it is not indispensable to the operation of some form of workers' compensation regime, Hickman curtly dismisses the statutory bar as arbitrary and unreasonable. In reaching this conclusion, however, the Chief Justice fails to discuss the relation of the statutory bar to other elements of the Canadian scheme or the policy implications which would be likely to result from its removal. Instead, he confidently asserts that the level of benefits to which claimants are presently entitled under the Act would be unaffected by the restoration of tort actions against employers.[19] Without substantiating this claim, the Court effectively substitutes its own judgment for that of the legislature.

Contrary to the Court's view of the matter, there is good reason to believe that the statutory bar represents a cornerstone of the Canadian workers' compensation system as it is presently constituted. Without it, it is highly unlikely that employers would continue to assume the entire cost of financing the scheme. This point is underscored by Kenneth Harding, Executive Director of the Association of Workers' Compensation Boards of Canada at the time of the *Piercey* case. In a submission made to the Court, Harding contends that if employers were to lose their present legal immunity, "they would seek to diminish their contributions to the benefit scheme in order to use that money to fund the added liability."[20] He goes on to suggest that such a reduction in employer contributions would lead to cuts in benefit levels or require workers to contribute directly to the fund.

---

[18] Damage awards are also conditioned by the conduct of the parties to the action. Thus, an injured plaintiff's award will be reduced if his own negligence contributed to his loss.
[19] (1986) 31 DLR (4th) 373 at 388.

This contention is supported by reference to the British workers' compensation plan. As Hickman points out, the British plan permits workers to take legal action against their employer for occupational injuries. However, he omits to point out that the British scheme is financed by contributions from employers, workers, and the state. Moreover, the British plan provides a more limited range and level of benefits than the Canadian plan. Unlike its Canadian counterpart, the British Act provides only "floor level benefits."[21]

The Court also omits to discuss the wider consequences of its proposed restructuring of the workers' compensation system. For example, the re-introduction of litigation into the workplace might well give rise to a more conflictual climate of industrial relations. As Professor Risk points out, one of the advantages of the statutory bar from the point of view of employers is its role in deflecting disputes arising from the compensation process away from employers and onto the workers' compensation board.[22]

---

[20] Affidavit of Kenneth B. Harding, sworn 1 April 1986 at 29-30. The text of this affidavit was submitted as background material on the Canadian workers' compensation system in a number of constitutional challenges to the Act brought in Alberta.

[21] *Ibid.*, 8.

In short, by proposing to pull out one thread of the workers' compensation scheme, the Court inadvertently threatened to cause other parts of the scheme to unravel. At this stage, however, the fate of the workers' compensation system remained to be determined by a higher court.

Reference to the Newfoundland Court of Appeal

Strictly speaking, Chief Justice Hickman's remarks regarding the constitutionality of the Workers' Compensation Act lay outside the authoritative part of the judgment, which dealt only with the applicability of section 15 to Mrs. Piercey's claim. As a result, the decision did not affect the Act's validity and hence could not be appealed. Nevertheless, it reflected the Court's position on the matter--and perhaps that of superior courts in other provinces--and for that reason could not be ignored. Indeed, the case created considerable uncertainty (and apprehension) about the constitutional status of workers' compensation legislation across the country. In order to dispel this uncertainty, the Newfoundland cabinet immediately sent the matter to the province's Court of Appeal by way of a constitutional reference.

Pursuant to Newfoundland's Judicature Act, the Attorneys General of all of the provinces, plus the Federal Justice Minister, were given notice of the case and automatic leave to intervene. The Court also granted intervener status to Mrs. Piercey, General Bakeries, and the Newfoundland Workers' Compensation Commission.

---

[22] R.C.B. Risk, "'The Nuisance of Litigation'", 459.

Underscoring the national importance of the case, ten other groups applied for and were granted leave to intervene. These included representatives of five provincial workers' compensation boards and a representative of the Yukon Board. In addition, interventions were made on behalf of the Canadian Manufacturers' Association (CMA), the Canadian Labour Congress (CLC), the Newfoundland Federation of Labour, and Canadian National Railway. All of the interveners except Mrs. Piercey supported the constitutionality of the legislation.

The intervention in the case of so many groups is significant in two major respects. First, it provided the Court with an indication of the position taken by groups representing a fairly broad spectrum of interests affected by the workers' compensation system. Thus, the position of employers and workers was made known to the Court, as was the position of the agencies charged with administering the programme. For her part, Mrs. Piercey may be said to have represented individual workers desiring recourse to the courts either to secure more substantial cash benefits than those available under the Act, or to hold employers directly accountable for their negligent conduct.[23]

Secondly, the support given to the legislation by the CMA and the CLC represented a re-affirmation of the political compact between business and labour which had established the terms of the original Ontario Act. This is not to suggest that these groups are entirely satisfied with the workers' compensation system. For labour, a recurring complaint relates to the adequacy of benefit payments. This grievance has been highlighted in recent years by an explosion in court-awarded damages received by victims of non-occupational injuries. Significantly, however, labour groups have responded to this development not by demanding a restoration of the right to sue, but by intensifying their calls for a more generous schedule of benefits under the Act.

---

[23] Mrs. Piercy thought it wrong that she should receive benefits from the Workers' Compensation Commission rather than from General Bakeries, which she held responsible for her husband's death (*The Globe and Mail*, 25 April 1989, A-2.).

Employers too have voiced criticisms of workers' compensation, particularly about its mounting costs. For example, a recent statement by the CMA criticizes the coverage under the Act of injuries which are not, in its view, conclusively work-related. The cost of such coverage, it notes, undermines "business's ability to compete in today's global economy."[24] Nevertheless, like organized labour, business groups do not seek a return to the tort system. Indeed, following the release of Hickman's judgment, numerous business spokesmen expressed concern about the necessity of purchasing insurance coverage while continuing to pay workers' compensation premiums.[25] In short, business and labour remain overwhelmingly committed to maintaining the essential elements of workers' compensation, including the statutory bar. Both groups take the view that their concerns can be accommodated without altering the basic principles underpinning the system.

Court of Appeal Decision

In a ruling delivered in October, 1987,[26] the Court of Appeal unanimously upheld the constitutionality of the impugned sections of the Act. Two opinions were delivered by the Court, a majority opinion written by Chief Justice Goodridge (and concurred in by three other Justices) and a minority opinion written by Mr. Justice

---

[24] *Workers' Compensation in Canada: Facing New Realities* (Canadian Manufacturers' Association, 1989) i.

[25] *The Lawyers' Weekly* , 14 November 1986.

[26] *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1988) 44 DLR (4th) 501 (Nfld. CA).

Morgan. While differing somewhat in their reasoning, both agreed that the statutory bar on civil actions did not violate section 15 of the Charter.

Goodridge begins by observing that not every case of differential treatment constitutes a denial of the right to equality within the meaning of section 15. Virtually all legislation, he notes, makes distinctions among different classes of people in the course of conferring benefits and imposing obligations. Only those inequalities which are "discriminatory" in purpose or effect attract the scrutiny of the Charter. Discrimination, in turn, refers to "unreasonableness or unfairness" in the impugned legislation.

Goodridge adopts as a test of equality the proposition that persons who are "similarly situated" should be similarly treated.[27] Applying this test, he finds that the Act differentiates between "victims of tort" who incur damages in the course of employment and those who incur damages in other contexts. While the latter are entitled to pursue a claim for compensation in the courts, the former are barred from doing so. Such unequal treatment, he hastens to add, is not necessarily discriminatory (i.e., unfair or unreasonable). Noting that the right to pursue a legal action has been replaced by another right--namely, the right to receive compensation benefits--he argues that the discriminatory nature of the Act depends on the adequacy of the new right. In Goodridge's words: "If this right is found not to measure up to a point where it can be said that there is no discrimination or no unreasonableness or unfairness, then the displacement will have offended section 15."[28]

---

[27] This test was rejected by the Supreme Court of Canada in its first ruling on section 15, *Andrews* v. the *Law Society of British Columbia* [1989] 1 SCR 143. Nevertheless, when the workers' compensation reference reached the Supreme Court of Canada, the Court upheld the Appeal Court's decision (albeit on the basis of *Andrews*). See *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1989) 56 DLR (4th) 765 (SCC).

[28] (1988) 44 DLR (4th) 523-24.

At this point there is an abrupt and significant change in Goodridge's line of reasoning. Rather than proceeding to evaluate the adequacy of the right to compensation, as he appeared resolved to do, he instead withdraws behind the curtain of judicial deference to legislative policy. It is the task of the legislature, he asserts, to choose the particular structure of the workers' compensation regime. "The Charter does not, and the court cannot, require that legislative policy be perfect."[29] Thus, while acknowledging that the statutory bar may deny injured workers the opportunity to seek potentially large damage awards, he dismisses this as "but a negative feature of an otherwise positive plan."[30]

In a further disavowal of judicial interventionism, Goodridge contends that the legislature should have a still freer hand in fashioning "social programmes" such as workers' compensation. In the words of the Chief Justice:[31]

> The Charter was not designed to interfere with beneficial social programmes of the legislature. It was not designed to regulate or patrol these programmes. Only where there is contained in the programme something that is unfair or unreasonable will courts interfere.

Social legislation is therefore to be subject to a lower level of judicial scrutiny than other kinds of legislation. Unfortunately, the Court declines to define the term "social legislation" or to explain why it should be subject to less exacting review than other legislation.

These questions were not addressed by the Supreme Court of Canada in its decision on the appeal. In a terse three-sentence judgment, the Court dismissed the appeal on the grounds that the position of workers under the workers' compensation system "is in no way analogous to [that of] those listed in s.15(1)."[32] As no further reasons were given, it was unclear to what extent the Court endorsed the reasons of the Newfoundland Court of Appeal. As Dale Gibson remarks, "The brevity of the reasons makes any attempt to interpret the decision utterly speculative."[33]

---

[29] *Ibid.*, 524.
[30] *Ibid.*
[31] *Ibid.*

Conclusion

The *Piercey* case represents an early attempt to use the Charter to curtail the scope and operation of a major social programme. In its decision, the Newfoundland Court of Appeal not only upholds the validity of the legislation, but also sends out a strong message about the necessity for judicial restraint in reviewing Charter challenges to "social legislation" in general. Interestingly, the courts do not appear to be exercising such restraint in regard to social programmes alleged to be unreasonably restrictive in scope. Three such cases are discussed in the following chapter.

---

[32] (1989) 56 DLR (4th) 766.

[33] Dale Gibson, *The Law of the Charter: Equality Rights* (Carswell, 1990) 257.

4. Equal Benefit of the Law and Equal Benefits

A. Introduction

The most significant area of Charter litigation touching the welfare state, both in terms of the number of cases and the incidence of success, has seen the Charter used with a view to expanding the Canadian welfare state. Specifically, the equality provisions of the Charter have been used to challenge a variety of programmes which confer unequal benefits on different classes of claimants, or which exclude entire classes of potential beneficiaries altogether. The argument in these cases is that the impugned programmes violate section 15 of the Charter by denying "equal benefit of the law."

In this chapter, I examine three cases in which the Charter has been used to challenge the adequacy of existing benefit programmes. The first case concerns a challenge to the validity of a B.C. regulation which provided for the payment of lower social assistance benefits to single persons under 26 than to those 26 or older. The object of the case was to establish the entitlement of persons under 26 to the same (higher) benefits payable to the older category of recipients. The second case concerns a challenge to a Nova Scotia programme which provided child support benefits to single mothers but made no comparable provision for single fathers with dependent children. In that case, the litigant sought a declaration that child support benefits be made available to single parents without regard to the parent's sex. The third case concerns a challenge to the parental benefits provisions of the Unemployment Insurance Act. This case is similar to the second in that the litigant sought a declaration that certain benefits available to one class of persons (adoptive parents) be extended and made equally available to another class of persons (natural parents). The last case is particularly significant. It squarely addresses the issue of the courts' authority to grant "positive" remedies under section 24(1) of the Charter: that is to say, remedies which "amend" legislation and entail the expenditure of significant public funds without parliamentary approval.

As in the previous chapter, I take a multi-faceted approach to the cases in question. Thus, in addition to discussing the judgments themselves, I identify the individuals and groups involved in the case, the history of the legislation, and the response of the relevant governments to the respective court rulings. I also assess the political significance of the cases and their broader implications. I conclude that the Charter represents an important new avenue by which individuals or groups may pressure governments to fill "gaps" in social benefit programmes, either by extending benefits to hitherto excluded groups or by eliminating inequalities in the benefits provided to different classes of recipients. In this way, the Charter may serve as a tool to expand the frontiers of the welfare state. The expansionary impact of the Charter, however, ultimately depends on the willingness of the state to undertake additional social spending. As the cases indicate, the government may choose to off-set the cost of new social spending (at least to some extent) by curtailing social benefits payable to other recipient groups.

B. The Charter and Social Assistance in B.C.: the Silano case

The *Silano* case is an interesting study in "judicialized" politics in the era of the Charter. The case was launched in September, 1985 to challenge selective cuts in social assistance benefits in B.C.--cuts which had been introduced eighteen months earlier as part of the Social Credit Government's controversial restraint programme. Although the Government encountered widespread opposition to its programme, it pressed ahead, making relatively few concessions to its opponents. Given the failure of political pressure to compel the Government to abandon or modify its position, the *Silano* case was launched as a rearguard action calculated to achieve through the courts that which seemed impossible to achieve through political action. Although the legal action was successful, the Government was able to neutralize its impact by reducing the level of benefits paid to another category of recipients. The case therefore reveals the limitations of the Charter as an instrument for blocking cutbacks in social benefits.

The case was brought by the B.C. Public Interest Advocacy Centre on behalf of John Silano, a twenty-year-old recipient of social assistance who had agreed to let his name stand in a test case. The target of the action was a regulation under the Guaranteed Available Income for Need Act (GAIN),[1] the effect of which was to provide a lower level of monthly income maintenance payments to recipients under the age of 26 than to those 26 or older. The regulation in question was alleged to violate section 15(1) of the Charter "by denying the plaintiff and other GAIN recipients the right to the equal protection and equal benefit of the law without discrimination on the basis of age."[2] Accordingly, Silano sought a court order declaring the regulation to be of no force or effect.

History of the Legislation

Introduced in 1976, the GAIN Act represents a consolidation of all provincial income assistance programmes. The Act delegates to the Minister of Human Resources the authority to determine the classes of persons eligible for benefits and the level of benefits payable. From the Act's inception, the regulations were amended annually to maintain the purchasing power of benefits.[3] However, beginning with the 1983 provincial budget, the Government announced that it would defer the annual compensatory increase. At the same time, the Government declared its intention to proceed with a sweeping series of measures ostensibly designed to reduce the province's operating deficit. These measures included the elimination of 7,000 provincial government jobs (including staff cuts in the Ministry of Human Resources); a freeze on civil service salaries; the abolition of various boards and agencies (including the Human Rights Commission, the Employment Standards Board, and the rent review board); more centralized control of school board budgets; and further reductions in provincial funding of post-secondary education. In addition, the Government introduced several bills designed to curtail collective bargaining and seniority rights in the public sector.

---

[1] B.C. Reg. 479/76, Sched. A, s.4.

[2] Text of Writ of Summons issued out of the Supreme Court of British Columbia, 24 September 1985 (*Silano and The Queen in Right of the Province of B.C.*).

Opposition to the Government's proposals was widespread and gave rise to a campaign of extra-parliamentary opposition unprecedented in the political history of the province. The coordinating body for this campaign was the Solidarity Coalition, an umbrella organization of trade unions and community groups under the *de facto* leadership of the B.C. Federation of Labour.[4] During the first phase of its campaign (August to October, 1983), Solidarity relied on mass demonstrations, information pickets, and the circulation of a province-wide petition to persuade the Government to abandon the most draconian features of its restraint programme. Undaunted, the Government pressed ahead, thwarting an NDP filibuster by holding all-night sittings of the Legislature and invoking closure with unprecedented frequency.[5]

---

[3] Angela Redish, "Social Policy and 'Restraint' in British Columbia" in Robert C. Allen et al, eds., *Restraining the Economy: Social Credit Economic Policies for B.C. in the Eighties* (Vancouver: New Star Books, 1986), 153.

[4] Stan Persky, *Fantasy Government: Bill Vander Zalm and the Future of Social Credit* (Vancouver: New Star Books, 1989), 12.

[5] For example, closure was used ten times on one bill alone, the Public Sector Restraint Act, on October 11, 1983.

The second phase of the campaign involved a planned series of strikes, beginning with a legal strike by members of the 35,000-strong B.C. Government Employees Union (B.C.G.E.U.) on November 1, 1983. The following week, 42,000 education workers (including most of the 28,000 members of the B.C. Teachers' Federation) began an illegal job action, followed two days later by Crown agency employees. Further industrial action was comtemplated, including a general strike of all public and private sector unions in the province.[6] This development was forestalled, however, by the conclusion of a tentative agreement between the Government and the B.C.G.E.U. after a week of intensive negotiations.[7] This agreement formed the basis for a larger political settlement reached between Premier Bennett and Jack Munro on behalf of the Solidarity Coalition. Under the terms of the so-called Kelowna Accord, the Government agreed to loosen or withdraw restrictions on public sector collective bargaining and to hold consultations on a variety of matters, including the drafting of a revised provincial labour code.[8] In exchange for these and other concessions, strikers were to return to their jobs.

The major achievement of the Kelowna Accord was the preservation of collective bargaining rights in the public sector.[9] The Accord made no substantive commitments regarding welfare and human rights issues, prompting critics to accuse union leaders of having sacrificed these issues in the interests of the immediate grievances of the strikers.[10] In any event, the truce reached at Kelowna "served to demobilize the Coalition" to the point where it registered only a relatively weak protest three months later when the Government proceeded to re-introduce many of the bills which had earlier died on the order paper or been withdrawn.[11]

---

[6] William K. Carroll, "The Solidarity Coalition" in Warren Magnusson et al, eds., *The New Reality: The Politics of Restraint in British Columbia* (Vancouver: New Star Books, 1984) 102-103.
[7] In essence, the agreement provided for the withdrawal of a bill restricting the scope of public sector collective bargaining and for certain concessions on newly enacted labour legislation.
[8] *Ibid.*, 104-105.
[9] *Ibid.*
[10] *Ibid.*

In February, 1984, the Government began to implement explicit cuts in social spending. These cuts included the provision of $25 per month less for GAIN recipients under the age of 26 during the first eight months of eligibility. This measure alone was expected to save the treasury $5.5 million.[12] Another amendment to the GAIN Act regulations denied benefits to persons awaiting unemployment insurance except in emergency cases. This measure was expected to save $15 million.[13] In political terms, the Government was able to proceed with its agenda with relative impunity. After all, there was little prospect of a successful remobilization of the Solidarity movement. For its part, the provincial NDP was dispirited, having recently suffered its third consecutive election defeat. In addition, as Party leader Dave Barrett had announced his retirement from the leadership in January, 1984, the Party was unwilling to goad the Government into calling a snap election before his successor could be chosen at a leadership convention. In any event, the Government was secure in its majority for the next three to four years and had already demonstrated a willingness to bend the traditions of parliamentary government in order to implement its legislative programme.

In this post-Solidarity environment, the courts offered the only practicable recourse available to the Government's opponents to thwart elements of its legislative programme. As Richard Gathercole, Silano's lawyer, puts it, welfare rights activists concluded that "political pressure had not been successful and was not likely to be successful."[14] As a result, the Vancouver Unemployed Action Centre approached the B.C. Public Interest Advocacy Centre with a view to challenging the constitutionality of the GAIN Act regulations.[15]

---

[11] *Ibid.*
[12] *News Release*, Ministry of Human Resources (20 February 1984).
[13] *Ibid.*

It should be noted that the B.C. Public Interest Advocacy Centre (hereinafter referred to as "the Centre") is a non-profit organization which provides legal representation for individuals and groups in cases which raise "issues of general public concern and where legal assistance is not otherwise available to the group or individual concerned."[16] The Centre conducts legal actions and intervenes in regulatory applications on behalf of a variety of interests, from anti-poverty organizations to consumer interest groups. The majority of its funding is provided by the B.C. Law Foundation.[17]

The Charter Challenge

In attacking the constitutionality of the age discrimination provisions of the GAIN Act regulations, the Centre described as a "bald generalization" the Government's assertion that persons under 26 have resources unavailable to persons 26 or older.[18] The need for and cost of food and other necessities, it contended, is not related to the age of the recipient. Persons under 26, he continued, are "similarly situated" to those 26 and older in regard to their monthly subsistence needs. In this connection, the Centre produced evidence to the effect that, even before the application of the age deduction, the maximum rate of claimable benefits under the GAIN Act fell significantly below the poverty line. As a result, any further reduction in benefits based on age would be "clearly prejudicial to the Plaintiff."[19]

---

[14] Letter to the author by Richard J. Gathercole, 30 November 1990.
[15] *Ibid.*
[16] *Ibid.*
[17] See *1989 Annual Report* (British Columbia Public Interest Advocacy Centre).
[18] B.C Supreme Court, Plaintiff's Chambers Brief, 11.

In defending the regulation, the Government contended that it represented a reasonable response by the Minister to budgetary pressures occasioned, on the one hand, by a substantial increase in caseloads in the early 1980's, and, on the other hand, by a 5 per cent cut in the income assistance budget under the Government's restraint programme.[20] Faced with these constraints, the Minister chose to target benefit cuts in such a way that "the benefits available to the most disadvantaged [would] not have to be reduced."[21] In making this determination, the Minister concluded that persons under 26 were better placed to absorb a reduction in benefits than were older persons since the former are generally "more mobile and . . . likely to obtain assistance from their families."[22]

The Government also advanced a more general argument about the limits of judicial interference in the "traditional policy-making functions of the legislative branch."[23] In particular, it warned of the danger of the courts' considering specific benefit provisions in isolation from the full range of benefits available to each group of recipients. The Government put this argument as follows:[24]

---

[19] *Ibid.*, 12.

[20] Memorandum of Argument, 25.

[21] *Ibid.*, 26-27. The Government went on to point out that some $5 million had been saved since the introduction of the new regulation, representing almost one-quarter of the total amount saved from other changes to the GAIN programme.

[22] *Ibid.*

[23] *Ibid.*, 17.

> If the courts are to begin interfering with the exact lines which have been drawn and the particular types and levels of benefits available, this will be the first of many questions put to them. The result will be that they will become deeply involved in "the bog of legislative policy-making," a function for which, it is submitted, they are not appropriately suited.

In demanding that persons under 26 be accorded equal benefit of the law, the litigants' obvious objective was to ensure that persons in this category receive the same higher level of benefits payable to persons 26 and older. While acknowledging that this would entail a cost to the treasury--some $4.5 million in the Government's estimation--the Centre argued that cost savings alone do not constitute a valid reason to discriminate. The Government, however, was already considering its options in the event of an adverse ruling by the Court. In its written submission to the Court, the Government pointed out that a declaration of equal entitlement "would not necessarily mean that the rate would be set at the current rate" for persons 26 or older. "It may be [it continued], because of the costs involved, that both groups will receive benefits at an equal, but lower rate."[25]

B.C. Supreme Court Ruling

Briefly stated, the B.C. Supreme Court accepts the Centre's submissions and holds the age distinction to constitute a violation of section 15(1) of the Charter. In his ruling, Mr. Justice Spencer allows that the goals of the regulation--namely, the conservation of provincial revenues and the allocation of scarce financial resources among applicants on the basis of need--constitute "proper purposes for government to have in mind."[26] He finds, however, that the means chosen to give effect to those goals constitute discrimination on the basis of age, contrary to section 15(1). Specifically, he finds the impugned regulation to be unreasonable and unfair to persons under 26 by attributing to them "the qualities of mobility and the potential for family support . . . whether or not they have them."[27] By the same token, the regulation arbitrarily assumes persons 26 or older to lack these qualities. In short, he finds there to be "no logical basis for the grounds of distinction" contained in the regulation.[28] He further finds that the regulation is not saved by section 1. On this point he concludes, without elaboration, that non-discriminatory measures could have been devised for determining the needs of various GAIN claimants.

---

[24] *Ibid.*, 19.
[25] *Ibid.*, 20.
[26] [1987] 5 WWR 745.

The Government's Response

The age distinction regulation having been declared unconstitutional, welfare advocates assumed that the Government would shortly act to raise GAIN benefits payable to persons under 26 to the same level as those payable to persons 26 or older. Richard Gathercole, counsel for the Advocacy Centre, said that "[w]ith the section declared illegal, welfare recipients in B.C. will be entitled to their full level of payments."[29] NDP Social Services critic John Cashore echoed this view, declaring that the Government had a duty to comply with "the intent of the law."[30]

The Government, however, took a different view of the decision. As Social Services Minister Claude Richmond put it: "The Court says everyone has to be at the same rate. It doesn't say what the rate is."[31] Three days later the Government announced that GAIN payments to persons under 26 would be increased by $19 per month, while those payable to persons 26 or older would be reduced by $6 per month. From the Government's standpoint, this solution had the admirable effect of maintaining the overall size of the province's income maintenance budget. For welfare recipients, the Government's announcement was bitter fruit. While 15,000 claimants under 26 were better off than they had been before, twice that number were now worse off.[32] As one anti-poverty activist put it, the Government's action was "unbelievably vicious."[33]

---

[27] *Ibid.*
[28] Ibid., 746.
[29] "Welfare Rules called Charter violation," *Vancouver Sun*, 7 August 1987, A-1.
[30] *Ibid.*
[31] "Crackdown on Welfare Fraud planned after cheques untaken" *Vancouver Sun* , 11 August 1987, A-2.

Evaluation

Strictly speaking, the Government's decision to average benefits complied with the letter of Justice Spencer's decision. However, it clearly defied the intent of the judgment, which was revealed by the Judge's reference to the $25 per month difference in benefits as "a significant amount" of "real importance" to many recipients of social assistance. Moreover, the lowering of benefits paid to persons over 26 flew in the face of a well-established principle governing "equal pay for equal work". According to this principle, equality in the wages paid to men and women for equal work is not to be achieved by lowering the wages of the better paid category of workers but by raising the wages of the under-paid group.[34]

While its decision was widely criticized, it should be remembered that the Government was no stranger to controversy. Its restraint programme, after all, had brought the province to the brink of a general strike. Moreover, the new premier, Bill

---

[32] "Welfare War Vowed over Cuts" *Vancouver Sun*, 14 August 1987, A-1.
[33] *Ibid.*
[34] *E.g.*, Human Rights Act, SBC 1984, c.22, section 7(4); Individual Rights Protection Act, RSA 1980, c.I-2, section 6(5).

Vander Zalm, was even more strongly committed than his predecessor had been to the neo-conservative precepts underpinning the restraint programme. Indeed, despite his 1986 election pledge to introduce a more consensual style of government, Vander Zalm not only provoked a one-day general strike in 1987, but also attempted (unsuccessfully) to prevent further protest by means of a sweeping injunction against seditious activities. As to the Premier's views on the plight of welfare recipients, it should be noted that as Human Resources Minister under the Bennett Government, Vander Zalm suggested that the able-bodied among them "pick up the shovel" or face unspecified penalties.[35] He is not known to have altered this view.

In short, the *Silano* case reveals the limitations of Charter litigation as a means of challenging reductions in social assistance benefits, at least in the case of a government ideologically committed to holding the line on such expenditures.

C. Family Benefits in Nova Scotia--the Phillips case

While the *Silano* case concerned a claim of discrimination in the unequal level of benefits paid to two classes of recipients, in *Re Phillips*[36] the validity of a provincial income maintenance programme was attacked on the grounds that it wrongfully denied a class of persons access to any benefits at all. Specifically, a section of the Nova Scotia Family Benefits Act providing for the payment of child support benefits to single mothers was alleged to contravene the equality provisions of the Charter because it denied similar benefits to single fathers with dependent children. The case was conducted by the Dalhousie Legal Aid Clinic on behalf of Charles Phillips, an unemployed single father whose application for provincial assistance for the support of his dependent child had been turned down. The challenge was successful in both the Trial and Appeal Divisions of the Nova Scotia Supreme Court, following which the Government moved quickly to provide family benefits to single mothers and fathers on an equal basis. While the Court rulings did not require the Government to extend benefits to single fathers, the political circumstances surrounding the case strongly suggest that, at the very least, the Appeal Court's ruling spurred the Government to quicken its pace in addressing this matter.

---

[35] 1975 quotation cited in *Vanouver Sun* , 19 June 1987, A-19.

[36] (1986) 27 DLR (4th) 156.

History of the Legislation

Introduced in 1977, the Family Benefits Act consolidates several income maintenance programmes in the province that were formerly governed by separate acts. The purpose of the Act is "to provide assistance to persons or families in need where the cause of the need has become or is likely to be of a prolonged nature."[37] As the Act stood prior to the *Phillips* case, the classes of persons eligible to apply for benefits included the aged, the disabled, and single, divorced, widowed, and separated women with dependent children. As for unattached men with dependent children, only disabled fathers were eligible to apply for benefits under the Act--benefits which were formerly provided under the Disabled Persons Allowance Act.

Such obvious sexual stereotyping all but invited a barrage of legal challenges under section 15(1) of the Charter. Because of this likelihood, other provinces took advantage of the delayed proclamation of section 15 to remove most of the formal sexual stereotypes which remained on their statute books. As Professor D.A.R. Thompson observes, many of these provisions were in the field of family law.[38]

---

[37] S.N.S. 1977, c.8, section 3.

In the event, Nova Scotia was the only province which continued to deny single fathers access to family benefits when section 15 of the Charter came into effect in 1985. The Government was well aware that this aspect of its programme might be vulnerable to attack under section 15(1). However, in rejecting calls by the provincial NDP for the extension of benefits to single fathers, Social Services Minister Edmund Morris suggested that in so far as the Act discriminated in favour of single mothers, it might be characterized as an "affirmative action" programme designed to promote the interests of a disadvantaged group. As such, it would constitute permissible discrimination under section 15(2) of the Charter. At the same time, however, the Minister also considered the denial of family benefits to single fathers to be a matter of principle. Responding to Opposition questions on the matter in the Legislature as early as 1982, Morris remarked: "I do not believe that majority sentiment in our society supports governments maintaining indefinitely male heads of families who are unemployed . . . on family benefits. I think the thrust of society ought to be towards retraining them and putting them into employable . . . earning capacities."[39] The Minister was also evidently concerned about the cost of extending family benefits to single fathers.[40]

---

[38] D.A. Rollie Thompson, "A Family Law Hitchhiker's Guide to the Charter Galaxy," *The 1988 National Family Law Program*, Vol. 1 (Law Society of Upper Canada, 1988), G2.
[39] Nova Scotia House of Assembly Debates and Proceedings, 17 June 1982, 4081.
[40] *Ibid.*

Political Context

In order to understand the origins of the Charter challenge and the Government's reaction to it, some mention should be made of the political controversies which descended on the Social Services Ministry during this period. These controversies grew out of a profound antagonism between the Social Services Minister, Edmund Morris, and certain welfare rights advocates. As one observer puts it, Morris's dealings with certain welfare claimants and their legal representatives "[took] on the trappings of a vendetta."[41] This may be gleaned from the Minister's reaction to a renewed call by NDP Leader Alexa McDonough in March, 1984 for amendments to the Family Benefits Act to remove sex discrimination. At a press conference in Halifax, McDonough discussed the plight of Daniel Doyle; a divorced parent of two young boys who was ineligible for benefits under the Act because of his sex. The following day, Morris took issue with NDP claims about Doyle's financial difficulties and disclosed to reporters details of Doyle's income from information on file with the Social Services Department. Defending his use of such information, Morris stated that Doyle had "forfeited his right to client confidentiality because he had made [his plight] a political party issue."[42]

Two years later, Morris launched a similar attack against Brenda Thompson, a welfare mother who had written a newspaper article blaming Morris for the difficulties faced by welfare claimants in dealing with his Ministry. Speaking to reporters outside the Legislature, Morris dismissed Thompson's article as being "ghost-written by the NDP." Then, as before, he proceeded to disclose information from her file, ostensibly to clarify the reasons for the Department's refusal to grant her benefits.[43] This time, however, the Opposition demanded that charges be laid against the Minister under the province's Freedom of Information Act for unauthorized disclosure of confidential information. When the Attorney General refused to lay charges, Thompson initiated a private prosecution. In the result, Morris was convicted and fined $100.

---

[41] Peter Kavanagh, *John Buchanan: The Art of Political Survival* (Halifax: Formac, 1988) 146.
[42] "Hundreds Worse Off than Daniel Doyle," *Halifax Chronicle-Herald* , 22 March 1984, 9.

Another target of the Government's wrath was the Dalhousie Legal Aid Clinic, which launched several important constitutional challenges to provincial social welfare legislation during this period, including the *Phillips* case. In February, 1986, shortly before the Nova Scotia Supreme Court rendered its decision in *Phillips*, the Government terminated all provincial funding to the Clinic--a contribution equivalent to 25% of the Clinic's total revenues. While the Government denied that its decision was politically motivated, Morris described the Clinic as "a training school for NDP candidates."[44] In addition, three ministers who publicly criticized the funding cut-off acknowledged that the Government had objected to the Clinic's "social and political activities."[45]

In summary, the Buchanan Government was disinclined to extend child care benefits to single fathers both because of the cost of doing do and because of the Government's conservative views about family life. In addition, as Kavanagh observes, the Minister of Social Services tended to regard any criticism of his department as an attack on himself personally.[46] In these circumstances, the short-term prospects for successful political action to effect an extension of family benefits coverage were not promising. The Charter therefore recommended itself as a means of compelling the Government to act.

---

[43] "Nova Scotia social services minister mired in battles over welfare rules," *Montreal Gazette* , 24 October 1987, B-5.
[44] "Province ends funding for Dalhousie Legal Aid," *Halifax Chronicle-Herald*, 1 February 1986, 2.
[45] *Ibid.* 20. See also Joan M. Dawkins, "Living to Fight Another Day: The Story of Dalhousie Legal Aid," *Journal of Law and Social Policy* 3 (1988) 1-20.
[46] Kavanagh, *John Buchanan*, 147.

The Court Rulings

In a short, three-page judgment, Mr. Justice Nunn of the Trial Division of the Nova Scotia Supreme Court accepts the contention that the provision of family benefits to single mothers and not to single fathers constitutes discrimination in the basis of sex, contrary to section 15(1) of the Charter. The Court finds the distinction to be arbitrary and unreasonable in view of the stated purpose of the Act: namely, the provision of assistance to persons in need. The distinction is also unreasonable in the Court's estimation because of "changes in modern society and life-styles."[47] On this point, the Court effectively gives short shrift to the Government's apparent unwillingness to depart from traditional conceptions of the social and economic roles of the sexes. Turning to section 1 of the Charter, Nunn relies heavily on the fact that no other province has similar provisions on its statute books, Ontario and Manitoba having recently abolished such discrimination expressly in order to comply with the requirements of the Charter.

What is particularly noteworthy about the decision is the remedy granted by the Court. In issuing a declaration that section 5(4) of the Act--the provision dealing with allowances for unwed mothers--is of no force or effect, the Court leaves single mothers and fathers equally disentitled to benefits. In practical terms, this places in jeopardy monthly benefits received by some 3,300 unmarried mothers in the province.[48] Yet this is far removed from the real object of Phillips' application, which was for the Court to fashion a remedy extending benefits to single fathers with dependent children.[49] To this end, he asked the Court, in effect, to amend the Act by striking out selected words from one section of the Act or, alternatively, by inserting a gender-neutral term such as "parent" into the impugned section of the Act. Nunn refuses to do this, warning that the "Court ought not to assume the role of legislator except in unique and unusual circumstances, and then only rarely."[50] Cognizant of the effect of his decision, however, Nunn closes by observing that as the Legislature is to convene the next day, it will shortly be in a position to adopt such remedial legislation as it may see fit. Indeed, he goes on to suggest that such legislation could be made retroactive in order to assure single mothers of uninterrupted benefits.

---

[47] (1986) 27 DLR (4th) 156 at 158 (NSSCTD).

[48] "Nova Scotia to appeal court decision on payments" *Halifax Chronicle-Herald* , 11 March 1986, 1.

The Government, however, was not yet prepared to concede defeat. As Morris said of the Court's ruling, provincial taxpayers were "not in a position to absorb sudden and substantial dollar increases over and above the present $113 million gross cost."[51] Accordingly, an appeal was filed in the Appeal Division of the Nova Scotia Supreme Court together with a constitutional reference to test the validity of other potentially discriminatory provisions of the Act. In the meantime, the Government obtained a court order staying Nunn's judgment pending the outcome of the appeal in order to allow for the continued payment of benefits to single mothers.

The Court of Appeal upheld the judgment of the lower court in a decision handed down in November, 1986.[52] In a separate judgment on the constitutional reference delivered on the same day, the Court ruled that three other subsections of the Act differentiating between mothers and fathers ran afoul of section 15(1) of the Charter.[53] In both cases, the Court largely reiterated the reasoning of the lower court.

---

[49] Nevertheless, Phillips' counsel did request, as an alternative remedy, that section 5(4) be struck down. As Gwen Brodsky and Shelagh Day observe, the reason for this request is not clear since it "would not result in benefits being paid to Phillips, but would simply result in poor women being denied benefits." (*Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* , 57.)

[50] (1986) 27 DLR (4th) 156 at 159.

[51] *Halifax Chronicle-Herald*, 11 March 1986, 1.

[52] *A.G. of Nova Scotia* v. *Phillips* 34 DLR (4th) 633 (NSSCAD).

The Government's Response

In contrast to the aftermath of the *Silano* case in B.C., the Buchanan Government responded to the Appeal Court rulings by extending benefits to single mothers and fathers at the full pre-existing level of benefits. This it did not by amending the statute, but by passing an order-in-council amending the regulations.[54] Six months later, in August, 1987, the Government's *bete noire*, Dalhousie Legal Aid, launched another constitutional challenge to the Act, alleging age discrimination in the provision of lower benefits to teen-age mothers than to adults. This time, the Government chose not to contest the case; instead, it "quietly amended the regulations to give teenagers equal treatment."[55]

Evaluation

In this case, it would appear that Charter litigation was instrumental in bringing about the extension of social benefits to a hitherto excluded group. The courts did not, of course, order the Government to provide such benefits. Indeed section 5(4) (and other provisions of the Act) having been struck down, the remainder of the Act was presumably valid; consequently, the Government was under no constitutional obligation to act. Inaction on the Government's part, however, would have left single mothers with no entitlement to benefits. Such a scenario was politically untenable; it is for that reason that the Government sought to stay the Trial Court's judgment pending the appeal.

---

[53] *Reference Re Family Benefits Act* 75 NSR (2d) 338 (NSSCAD).
[54] N.S. Reg. 15/87.
[55] *Montreal Gazette*, 24 October 1987, B-5.

In order to provide family benefits to single mothers and comply with the Charter, the Government was obliged to make such benefits equally available to single fathers. Despite this obligation, the Government could have chosen the path taken by the B.C. Government in the aftermath of *Silano*. That is, it could have reduced the benefits payable to single mothers in order to mitigate the cost of providing equal benefits to single fathers. In the event, it chose not to do so. As a result, single fathers became eligible to draw full family benefits.

D. U.I.C. Parental Leave Benefits --the Schachter case

Like *Phillips*, the *Schachter* case represents an attempt to use the Charter to enlarge the scope of a social welfare programme. In the latter case, a challenge was brought to the Unemployment Insurance Act on the grounds that its provisions concerning child-care benefits discriminated against natural parents, contrary to section 15(1) of the Charter. Specifically, it was asserted that child-care benefits should be payable to natural parents on the same basis as those which are payable to adoptive parents under the Act. The novelty of the case lies in the remedy granted by the Trial Judge. While ruling that the relevant provisions of the Act constituted discrimination, Mr. Justice Strayer of the Federal Court of Canada declined to strike them down. Instead, he issued a declaration that as long as the Act continued to provide parental benefits to adoptive parents, natural parents were entitled to receive the same benefits under the same terms and conditions.[56]

In issuing this declaration of entitlement, the Court takes an important first step in the direction of judicially mandated welfare rights. If the decision is upheld by the Supreme Court of Canada, the availability of such Charter remedies will represent an important political resource in the hands of welfare advocates. It will also advance significantly the role of the judiciary in determining the allocation of public funds among competing ends.

History of the Legislation

Maternity benefits were not available under the Unemployment Insurance Act until 1971. Until that time, the Federal Government had rejected calls for their inclusion because maternity benefits were deemed to be incompatible with the governing principles of the U.I. programme.[57] Specifically, unemployment insurance benefits were intended for "bona fide members of the labour force who were involuntarily unemployed, who had made the required contributions, and who were capable of and available for suitable work."[58] Pregnancy, in contrast, was presumed to be so physically incapacitating (at least in its later stages) as to make women unavailable for work. In addition, it was presumed to constitute a voluntary withdrawal from the labour force.[59] Following further study, however, the Government decided to make provision for 15 weeks of unemployment benefits for pregnant women. These benefits were subject to special eligibility criteria designed to ensure that claimants had a "bona fide attachment to the labour force."[60]

---

[56] *Schachter* v. *Canada Employment and Immigration Commission* (1988) 18 FTR 199 (FCTD).
[57] F.L. Morton and Leslie Pal, "The Charter of Rights and Public Administration," *Canadian Public Administration* 28:2 (1985) 224.
[58] *Ibid.*
[59] *Ibid.*

The emphasis of the original maternity benefits provisions was on pre-natal disability, as opposed to post-natal recovery and child care. Thus, under the original terms of the Act, mothers were only permitted to claim a maximum of six weeks of benefits following the week of confinement. This provision was amended in 1977 to enable mothers to claim more (or all) of their allowable 15 weeks of benefits after delivery.[61] Amendments to the Act introduced in 1982 extended parental child-care benefits to adoptive parents. Under section 32, an adoptive parent was entitled to claim up to 15 weeks of benefits following the placement of an adopted child in the adoptive home.

A key difference between the two classes of benefits concerns the question of parental choice. In the case of adoptive parents, the Act permitted either parent to draw benefits provided that each was otherwise eligible to draw U.I. benefits. In the case of natural parents, only the mother was eligible for benefits. Natural fathers had no right to "paternity leave" benefits, subject to limited exceptions provided for by amendments passed in 1988.[62]

---

[60] *Ibid.*, 224-225. These criteria included the notorious "Magic Ten" rule which was intended to restrict U.I. benefits to pregnant women who were working prior to conception. This provision was challenged under the Canadian Bill of Rights in the *Bliss* case referred to in Chapter 2.

[61] S.C. 1976-77, c.54, section 38(1).

[62] S.C. 1988, c.8, section 32.1. This section permitted natural fathers to claim parental benefits only by reason of the death or disability of the natural mother.

The Charter Challenge

The facts of the case are as follows. Shalom Schachter and his wife, Mary Gilbert, were expecting their second child in the summer of 1985. Their plan was for Ms. Gilbert to return to work as soon as possible after delivery of the child and for Mr. Schachter to remain at home to care for the child. In part, this arrangement would give Mr. Schachter "an equal opportunity to establish a strong and positive relationship with the child at an early age."[63] Shortly after the birth of the child, Schachter took unpaid leave from his work as an arbitration officer with the Ontario Nurses' Association and applied for "maternity leave" benefits under the Unemployment Insurance Act, explaining that he and his wife intended to share the 15 weeks of benefits payable under section 30 of the Act. Schachter's application was turned down on the grounds that he had made himself unavailable for work. After exhausting the internal appeal procedure prescribed under the Unemployment Insurance Act, Schachter commenced an action in the Federal Court of Canada seeking a declaration that benefits should be payable to natural fathers for child care on the same basis as benefits were payable to adoptive parents. The denial of equal benefits, he submitted, constituted a denial of equal benefit of the law under section 15(1) of the Charter.

The Women's Legal Education Action Fund (LEAF) applied for and was granted intervener status in the case. LEAF was concerned that any extension of parental benefits to natural fathers not be achieved through the reduction of maternity leave benefits to mothers. In this case, as in many other Charter cases which have arisen under section 15 of the Charter, LEAF sought to introduce into the courtroom a "women's perspective on the equality issues that directly affect [women] and to defend the protections they have acquired."[64] LEAF's concerns in this regard were not without foundation. One of Schachter's proposals to the Court was that natural fathers be granted a share of the natural mother's pregnancy benefits. The Attorney General, on the other hand, urged that in the event section 32 were found to violate section 15, it be struck down. LEAF consistently argued against both of these positions.[65]

---

[63] *Per* Strayer, J., (1988) FTR 204.

Federal Court Decision

In a judgment delivered on 7 June 1988, Mr. Justice Strayer of the Federal Court of Canada ruled that the failure of the Unemployment Insurance Act to provide benefits to natural parents on the same basis as those provided to adoptive parents constituted discrimination contrary to section 15(1) of the Charter. Strayer observes that the Act discriminates in two ways. First, it discriminates against natural fathers by denying them benefits which are available to adoptive fathers. Secondly, it discriminates on the basis of sex by effectively designating natural mothers as the "natural and inevitable caregiver" while designating natural fathers as the principal breadwinner.[66] In other words, the Act[67]

> assumes that not only is it unnecessary that the natural father have the opportunity to receive partial compensation in lieu of employment income in order to stay home and be the principal caregiver, but also that the natural mother should not at least have the option, which his presence at home during this period would afford, to return to paid employment herself as a breadwinner if she is otherwise able to do so.

Strayer goes on to characterize these provisions as rooted in a "sexual stereotyping of the respective roles of the father and the mother generally."[68] Such stereotyping, he adds, is inconsistent with the "values of contemporary Canadian society." In support of this contention, he cites parental leave provisions in force in Manitoba and Saskatchewan, as well as recent amendments to the Canada Labour Code. He also cites numerous international agreements to which Canada is a signatory affirming the equal rights and responsibilities of parents in regard to child care.

---

[64] Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* 61.
[65] *Ibid.*
[66] (1988) FTR 208.
[67] *Ibid.*
[68] *Ibid.*

Recognizing the concerns of the intervener in the case, Strayer rejects the suggestion that maternity leave benefits should be shared by natural parents. These provisions, he concludes, are designed for the benefit of pregnant women and are only incidentally related to child care. This distinction, he notes, is drawn by a 1985 parliamentary committee report[69] and by the 1986 report of the Forget Commission on Unemployment Insurance.[70] Both reports recommend the creation of a two-tier system of benefits comprising maternity benefits and parental benefits, the latter to be available to adoptive and natural parents on the same terms and conditions.

Having found the parental leave provisions of the Act to be discriminatory, Strayer turns to the question of an appropriate court order.[71] In contrast to the approach taken in *Phillips*, Strayer chooses not to strike down the discriminatory provisions of the Act. These provisions are defective, he observes, not because they confer benefits which are prohibited by the Charter, but because they do not go "far enough in equally providing benefits to others who are similarly situated."[72] In other words, section 32 is "under-inclusive" in scope.[73] It would be neither appropriate nor just to strike down these provisions, he continues, since the effect of such an order would be to deprive adoptive parents of benefits under the Act. Instead, he proceeds to issue a declaration that natural parents of either sex are entitled to child care benefits under the same terms of entitlement as adoptive parents. Under the structure of benefits then existing, this meant that natural parents would be entitled to draw up to 15 weeks of child-care benefits. Either parent would have the right to claim such benefits, provided that each was otherwise eligible to draw U.I. benefits. Maternity benefits, meanwhile, would be unaffected by these changes.

---

[69] Report of the Parliamentary Committee on Equality Rights (Ottawa, 1985) 11.

[70] Royal Commission of Inquiry on Unemployment Insurance (Ottawa, 1986).

[71] As the Government chose not to invoke section 1 of the Charter, it was unnecessary for the Court to determine whether the discrimination constituted a reasonable limitation on the right to equality.

[72] (1988) FTR 214.

[73] *Ibid.*

Strayer's order represents an unprecedented assertion of judicial power under the Charter. For the first time, a Canadian court declares that in establishing a scheme of social benefits, the government must provide those benefits on a non-discriminatory basis. In the specific case before him, Strayer orders that Schachter's application for "paternity benefits" be remitted to the Unemployment Insurance Commission for review and determination "on the basis that, if [Schachter] otherwise meets the requirements of the Act, he is entitled to benefits."[74]

Strayer tempers this apparent exercise of "judicial legislation" by suspending the judgment pending appeal. This measure, he explains, will permit Parliament to take appropriate legislative action "should an appeal be taken and not succeed."[75] He stresses, moreover, that he is not prescribing a particular course of action which Parliament must follow. In order to bring the Act into conformity with the Charter, Parliament has three broad policy alternatives: it may extend similar benefits to natural parents; it may eliminate benefits to adoptive parents; or it may provide more limited, but equal, benefits to adoptive and natural parents.

---

[74] *Ibid.*, 217.
[75] *Ibid.*

Political Repercussions of the Decision

Strayer's decision was well received by women's groups and opposition M.P.'s. Lynn Kaye, President of the National Action Committee on the Status of Women, urged the Government to extend parental leave benefits to men and women on the grounds that it would "give men a chance to nurture the family."[76] In the House of Commons, Liberal and New Democrat M.P.'s urged the Government not to appeal the decision and instead to proceed with appropriate amendments to the Unemployment Insurance Act. In the event, the Government pursued both courses of action. First, it filed an appeal in the Federal Court of Appeal. The appeal did not contest the Trial Court's finding of discrimination; rather, it took issue with the nature of the remedy granted by the Court. Secondly, a full year after Strayer had delivered his judgment (but before the Federal Court of Appeal delivered its), the Government introduced a bill into the House of Commons extending parental leave benefits to natural parents. The bill provided for ten weeks of benefits to natural parents, but reduced from fifteen weeks to ten the benefits to which adoptive parents were entitled. In effect, the Government chose the third policy alternative identified by Strayer.[77]

Federal Court of Appeal Decision

In appealing Strayer's judgment, the Federal Government takes issue with the Court's authority to grant "positive" remedies under section 24(1) of the Charter. More specifically, the Government disputes the authority of the courts to grant Charter remedies which "[result] in a judicial amendment to the legislation and, as well, [entail] the appropriation of public monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament."[78] The Government's position is that where a law is inconsistent with the provisions of the Constitution, the only remedy which the court may properly grant is a declaration under section 52(1) of the *Constitution Act, 1982* that the law in question is of "no force or effect." It may not in such cases purport to "amend" the offending law pursuant to section 24(1), even if it considers such a remedy to be "appropriate and just in the circumstances." The appeal, however, is more than a dry exercise in statutory construction. The heart of the appeal goes to a more fundamental matter: the question of the appropriate roles of the judiciary and the legislature under a constitutional regime of entrenched rights.

---

[76] "Ottawa urged to expand benefits to 'give men a chance to nurture'" *Globe and Mail*, 10 June 1988, A-1.

[77] The Bill (C-21) proposed a wide-ranging series of amendments to the Unemployment Insurance Act. Because of the controversial nature of many of the Bill's provisions, the Liberal-dominated Senate voted to conduct lengthy public hearings on it. This process, together with the efforts of Liberal Senators to block the Federal Government's Goods and Services Tax legislation, delayed passage of Bill C-21 until October, 1990.

In a split (2-1) decision delivered on 16 February 1990, the Appeal Court upholds the judgment of the Trial Court. Speaking for the majority, Mr. Justice Heald finds it entirely proper for the court to issue positive remedies in the case of "underinclusive legislation." Indeed, he holds that such legislation "invites a remedy extending benefits"; moreover, "the right to equality of result enshrined pursuant to section 15 [would] be meaningless unless positive relief [were] provided."[79]

Heald rejects the Government's contention that positive remedies represent a significant (and inappropriate) enlargement of the role of the judiciary. In this connection, he argues that the practical effect of such remedies is no different from that of court orders striking down "constitutionally impermissible " obstacles. He explains this point as follows:[80]

---

[78] *Schachter* v. *The Queen* (1990) 66 DLR (4th) 638 (FCA).
[79] *Ibid.*, 650.

> [H]ad section 32 of the Unemployment Insurance Act been drafted in the reverse, i.e., by providing that child care benefits were available to all parents excepting those who were natural parents, appropriate relief could be given by striking out the exception under s.32 since natural parents would be restored to a position of equality with all other parents. In reality, the learned Trial Judge [Strayer] did exactly that, since, by his order, he restored natural parents to a position of equality with all other parents.

Heald further seeks to diminish the significance of positive remedies by contending that an order striking down a legislative provision "is just as much a judicial amendment as the remedy proposed by the Trial Judge."[81] He notes, moreover, that both kinds of remedies may impinge on the public treasury, either by requiring the expenditure of additional public funds, or by declaring invalid benefit provisions for which funds have been appropriated by Parliament. In the first category, he cites the Supreme Court of Canada's decision in *Singh* v. *Min. of Employment and Immigration,* which required that refugee claimants be accorded an oral hearing. This decision, he observes, "resulted in a substantial expenditure of public funds not authorized by Parliament."[82] In the second category, he points out that a declaration of invalidity in regard to section 32 of the Unemployment Insurance Act would likewise affect the public purse. Specifically, it would suspend the disbursement of moneys approved by Parliament for the benefit of adoptive parents.

Mr. Justice Mahoney issues a strong dissent to the majority opinion. In his view, the Charter does not empower the courts to mandate the expenditure of public funds. As he puts it: "The responsibility of the courts is to define the limits of legislation permissible under the Charter but it remains the responsibility of Parliament to enact legislation that meets its requirements."[83] In this connection, he observes that the Charter is but one element of the Canadian Constitution. Another element is the *Constitution Act, 1867*, the preamble to which proclaims the desire of the confederating provinces to adhere to a constitution "similar in principle to that of the United Kingdom." A fundamental principle of the British Constitution, he continues, is that the Crown may only levy taxes and disburse public moneys with the approval of Parliament. "The appropriation of public monies by a court," he contends, " is as offensive to that principle as its appropriation by prerogative."[84] In the face of this, Strayer's declaration "gives rise directly to a liability to disburse monies from the Consolidated Revenue Fund . . . in circumstances not provided for by Parliament."[85] He concludes that the appropriate remedy in this case is an order striking down section 32 of the Act.

---

[80] *Ibid.*, 647.
[81] *Ibid.*, 650.
[82] *Ibid.*, 652

Evaluation of Federal Court Rulings

Following its loss in the Court of Appeal, the Federal Government announced its intention to file an appeal in the Supreme Court of Canada.[86] This did not come as a surprise to Schachter's lawyer, Brian Morgan, who described the court rulings as "a very strong precedent that could apply in all sorts of areas of benefit law."[87] The most immediate implication of the decision was financial. Unless Parliament acted to adjust the benefits available to adoptive parents, it would be obligated to provide equal benefits to natural parents. Although the cost of such an extension of benefits was not addressed by the Trial Court,[88] it was estimated that the additional cost to the public treasury could reach $500 million a year.[89] Clearly, if similar declarations were issued by other courts in regard to other "underinclusive" benefit programmes, the cost to all levels of government could be substantial indeed.

---

[83] *Ibid.*, 658.
[84] *Ibid.*, 660.
[85] *Ibid.*, 659.
[86] The Supreme Court of Canada granted leave to appeal on 15 October 1990, but has yet to hear the appeal at time of writing.
[87] "UI Act discriminates against natural parents, federal court rules" *Globe and Mail*, 17 February 1990, A-7.

As noted above, the Government responded to Strayer's ruling by extending child care benefits to natural parents and reducing those available to adoptive parents. This move undoubtedly lessened the fiscal impact of the Trial Court's ruling. The fiscal impact of the decision was also mitigated by the fact that few working fathers were expected to be able to take advantage of the new UI entitlements because of the general lack of job security provisions for workers wishing to take paternity leave. Paternity leave is not a feature of the employment standards legislation of most provinces, nor is it provided for in the majority of collective agreements.[90]

These considerations do not, however, diminish the importance of the decision. In the first Charter ruling of its kind, a senior court in Canada extends the coverage of an established social programme to a hitherto excluded group. In so doing, it imposes an obligation on the state to provide benefits to a class of persons for whom Parliament did not intend to make provision. The ruling admittedly does not represent the recognition of an absolute right to child care benefits. Rather, as in earlier Charter rulings, the Court stipulates that once the state undertakes to provide social benefits, it must allocate those benefits on a non-discriminatory basis. These rulings, in effect, limit Parliament's discretion in structuring benefit programmes.

---

[88] Strayer stated that the issue of cost was not relevant to the determination of whether the Act infringed section 15. He added that it might have been relevant to a review of the legislation under section 1. However, as noted above, the Government chose not to invoke section 1.

[89] "Ottawa to appeal UI ruling for parents," *Edmonton Journal* , 31 March 1990, A-3.

[90] "UI Act ruled discriminatory on sex basis," *Globe and Mail* , 9 June 1988, A1-A2. At the time of the Federal Court rulings, Manitoba and Saskatchewan were the only provinces which guaranteed paternity leave to the general working population. Workers covered by the Canada Labour Code were also entitled to such leave. Following the adoption of Bill C-21, Ontario's new NDP Government announced that it would introduce legislation providing for up to 18 weeks of unpaid leave for natural and adoptive parents. The proposed legislation is designed to take effect retroactive to the effective date of the revised UI benefits ("Ontario guarantees parents unpaid leave," *Financial Post* , 23 November 1990, 3).

In *Schachter* , the Court goes one step further by declaring the entitlement to equal benefits of a large class of new claimants. The Court's acceptance of "positive" remedies of this kind confers a significant political resource on groups seeking to expand the coverage of social programmes or to raise the level of benefits paid to different classes of recipients. Such declarations arm successful litigant groups with a judicially sanctioned "right" to equal benefits. In this way, the claims of such groups assume a more exalted status than those of other groups. In addition, by throwing a constitutional spanner into the machinery of a given benefit programme, successful litigant groups can expect their claims to receive priority attention by the relevant government as it seeks to bring its programme into conformity with the Charter.

In the *Schachter* case, it is true that the Government had been urged by a parliamentary committee and a royal commission to extend child care benefits to natural parents. However, there is no guarantee that the Government would have acted on those recommendations as soon as it did, if at all. Indeed, it is noteworthy that the Government's discussion paper on Bill C-21 refers to the new child care provisions as one of several amendments to the Act made necessary by "recent court challenges."[91]

---

[91] *Success in the Works: A Labour Force Development Strategy for Canada* (Ottawa: Employment and Immigration, 1989), 10.

E. - Conclusion

In conclusion, it is clear that section 15(1) of the Charter is being enlisted by individuals and groups as a means of expanding the coverage, or raising the benefit levels, of selected social programmes. As such, it would appear to represent an important new tool with which to enlarge the welfare state. The impact of such litigation, however, depends ultimately on the response of governments. Thus, in two of the three cases examined in this chapter (*Silano* and *Schachter*), the government responded to adverse Charter rulings by increasing or extending benefits to one class of beneficiaries, but reducing those previously made available to another class of beneficiaries. In other words, the government achieved equality by "robbing Peter to pay Paul."

In addition to its impact in terms of reallocating government expenditures on social welfare programmes, the Charter has many other implications for the welfare state in Canada. For example, at a time when governments are preoccupied with the size of the public debt, the cases in this field serve to draw attention to inadequacies in the social welfare system. These matters are canvassed more fully in the next chapter.

5. The Charter and the Welfare State: Some Early Observations

A. Introduction

Chapters 3 and 4 describe four cases in which the Charter has been used to challenge the constitutionality of provisions of four pieces of social welfare legislation. In *Piercey* , the Charter was enlisted to restrict the scope of an established social programme, workers' compensation, on the grounds that it denied an alleged constitutional right of equal access to the courts. In the other cases, the Charter was invoked with a view to enlarging the scope of various social benefit programmes. The purpose of these challenges was to raise the level of benefits provided to a particular class of recipients or to extend benefits to a class of persons for whom no provision had been made.

In this chapter, I interpret these cases and discuss their broader political implications. The significance of the workers' compensation challenge lies in the result of the case and in the reasoning articulated by the Newfoundland Court of Appeal. Briefly stated, the decision assuages (without altogether extinguishing) fears that the Charter poses an imminent threat to the integrity of the welfare state. More broadly, the case illustrates the emergence of the courts as an important new forum of political debate in Canada. A major consequence of this is that organized groups having an interest in the outcome of the litigation are effectively obliged to intervene in the case.

The cases discussed in Chapter 4 suggest that Charter litigation has an important role to play in pressuring governments to address inequalities in the benefit levels or terms of entitlement of social programmes. The effect of such litigation, in other words, is to move these issues higher on the government's agenda. The cases also show, however, that governments may comply with adverse Charter rulings in various ways. In this connection, I identify several factors which may have shaped the governmental response in each of the three cases.

B. Workers' Compensation and the Charter

The *Piercey* case is an attempt to use the Charter to strike down a key component of an established social programme. The Trial Court decision and the ensuing constitutional reference are significant, therefore, because they provide an early indication of the courts' attitude toward Charter challenges of this kind. In the result, the judgments in these cases provide some reassurance to those who have expressed fears about the Charter's potential to "repeal" important provisions of the welfare state. The judgments do not, however, entirely dispel such fears.

On the one hand, the decision of the Newfoundland Supreme Court is decisively rejected by both the Court of Appeal and the Supreme Court of Canada. Moreover, the Appeal Court not only upholds the validity of the Workers' Compensation Act, but also declares that the Charter is not intended to "interfere" with social legislation, except in rare instances. On the other hand, it is not clear to what extent this declaration of judicial policy by the Newfoundland Court of Appeal may be taken to represent the authoritative position of the courts in general and of the Supreme Court of Canada in particular. As noted in Chapter 3, the Supreme Court of Canada declined to comment on this matter in its judgment on the appeal. Moreover, as the other cases in this study indicate, the courts are not averse to "interfering" with social programmes *per se* . In two of those cases, the courts unreservedly struck down provisions of two income-maintenance programmes; in the third, the court "amended" the terms of the Unemployment Insurance Act.

An important difference between these cases and *Piercey* , however, has to do with the purpose or likely effects of the litigation. In *Piercey* , the Charter is used to challenge a central governing principle of the legislation. Mrs. Piercey's aim, in effect, was to limit the scope of the workers' compensation scheme. In the other cases, in contrast, the essential nature and purpose of the programmes in question is not challenged. What is challenged instead, and declared invalid by the courts, is discrimination in the allocation of benefits under such programmes. This suggests, on the one hand, that the courts may be unwilling to apply the Charter to undermine the essential purpose of social legislation. On the other hand, they may be prepared to question legislative decisions about the targeting of social benefits.

Political Significance

Although Mrs. Piercey's challenge was ultimately unsuccessful, its significance transcends the case itself. In general terms, the case illustrates a feature of Canada's new constitutional order: namely, the possibility of attacking the validity of legislative programmes (or important elements thereof) on the grounds that they infringe one or more of the rights and freedoms inscribed in the Charter. This entails several notable political consequences which are reflected in the case.

First, the Charter permitted Mrs. Piercey to re-open a debate on the essential nature of workers' compensation in Canada--a debate which had lain politically dormant for decades because of the enduring political consensus underpinning the programme. The "debate" which the *Piercey* case occasioned was not, of course, a debate of the kind which took place in Ontario prior to the introduction of workers' compensation in 1914. In this instance, the "debate" was conducted in the courtroom and was restricted to lawyers engaged by the various individuals and groups nominally involved in the case.

A second and related consequence of the case is that it effectively forced supporters of the existing workers' compensation system to come to its aid by intervening in the reference case. Following Mrs. Piercey's surprising victory in the Newfoundland Supreme Court, the constitutional fate of workers' compensation was suddenly thrown into question. It therefore became a matter of some urgency for groups having an interest in the maintenance of the legislative *status quo* to take all appropriate steps to ensure its survival. As a result, an impressive range of organizations applied for and were granted permission to submit "evidence" to the court attesting to the Act's constitutional propriety.

Despite the legal trappings of this exercise, these organizations chiefly sought to impress on the court the tangible benefits of the statutory bar and the adverse policy implications of its removal. This feature of the case throws into sharp relief the Charter's potential to shift the arena of debate of "political" questions into the courts. It also underscores the vital interest which many organized interest groups may have in the outcome of Charter litigation. In intervening in the case, organizations such as the CLC and the CMA were evidently not prepared to leave sole conduct of the case to officials of the Attorney-General's department. Part of the reason for this may be that these organizations felt best able to explain to the Court the impact of the legislation on the interests they represented. The CLC, for example, in its brief to the Court laid particular emphasis on the benefits of the Act to workers. Representatives of the provincial workers' compensation boards, meanwhile, provided detailed information on the history and operation of the Canadian scheme. They also presented information on the workings (and shortcomings) of workers' compensation regimes under which employee lawsuits are permitted.

Courtroom "lobbying" of this nature raises a broader question about the accessibility of the courts in cases of this kind to other groups whose interests may be affected by the judgment of the court. In this instance, the relevant interests were well represented by "institutional" interest groups. These organizations had the resources and expertise to retain their own legal counsel and to ensure that their collective interests were made known to the Court. However, in future Charter challenges to welfare state legislation, the relevant interests may not be as well represented. Many social programmes, after all, are designed to meet the needs of socially and economically disadvantaged groups, such as single mothers, disabled persons, and the unemployed. These groups are unlikely to have the political resources to respond effectively to Charter litigation which is potentially harmful to their interests.

C. Silano, Phillips, and Schachter

In the cases discussed in Chapter 4, the object of the various litigants was to expand the scope, or to raise the level, of benefits provided under existing social programmes. Success in the courtroom, however, did not necessarily secure the attainment of this goal. Indeed, the practical effect of the cases was mixed. In *Silano* , the B.C. Government raised welfare benefits payable to one class of recipients while lowering those payable to another. Similarly, in *Schachter* , the Federal Government extended child-care benefits to a hitherto excluded group but reduced those previously payable to another class of persons. In *Phillips* , however, the Government extended the coverage of its family benefits programme without curtailing pre-existing benefits.

Clearly, governments retain significant (if less extensive) discretion in responding to adverse Charter rulings in this area. To reiterate Mr. Justice Strayer's observations in *Schachter* , the legislature has three broad alternatives in seeking to remedy benefits legislation which is found to deny the right to equality under section 15(1) of the Charter. First, it may cease to provide the benefits altogether, thereby making everyone equally disentitled to benefits. (This course of action has been described by various commentators as "equality with a vengeance.") Secondly, the government may extend benefits to an excluded class at the full pre-existing level of benefits.[1] Thirdly, the government may select a middle road by providing equal benefits to all, but at a reduced overall level.

A government's choice among these three alternatives is influenced by many factors, several of which are now discussed.

Silano

In *Silano* , the B.C. Government stymied the efforts of welfare advocates to use the Charter to challenge selective cutbacks in social assistance benefits. Indeed, its response to the B.C. Supreme Court's ruling actually lowered the living standards of most welfare recipients in the relevant category. This move by the Government was greeted with dismay by welfare advocates since welfare benefits had already been shown to be significantly below the poverty line. They considered the Government's response to be inappropriate and mean-spirited, imposing unnecessary hardship on an economically vulnerable group. The Government's decision could also be interpreted as a rebuke to the Court in that it undermined the intent, if not the letter, of the Supreme Court's judgment.

---

[1] This approach would include the elimination of benefit differentials within the existing framework of a programme by raising the benefits of the lesser paid group to the level of the better paid group.

In proceeding in this fashion, the Government was clearly concerned about containing public spending, particularly in the field of social assistance. This concern is not, of course, unique to British Columbia. What is unusual is the zeal with which the B.C. Government pursued this objective as well as other elements of its political agenda during this period. Following its re-election in 1983, Social Credit moved markedly to the right, introducing a controversial programme of neo-conservative measures. Moreover, as the tumultuous political events of 1983 amply demonstrate, the Government was perfectly willing to pursue those measures through confrontation.

This confrontational style of government was continued by Bill Vander Zalm, who succeeded Bill Bennett as premier in August, 1986. Despite Vander Zalm's early pledge to extend an olive branch to his political opponents, his government showed little inclination to compromise. This is borne out by a series of events in which the Government attempted to impose its narrow ideological view on public policy in the face of substantial public opposition. As noted earlier, the Government's controversial labour legislation, Bill 19, provoked a province-wide general strike in June, 1987. Eight months later, the Government created another storm of controversy by denying medicare coverage to women for abortion procedures.[2] If the Government's response to *Silano* was controversial, it was certainly not inconsistent with its behaviour on other issues.

---

[2] This step was taken by the Government in the wake of the Supreme Court of Canada's ruling in *Morgentaler* striking down the abortion provisions of the Criminal Code. The Cabinet's order to withhold medicare coverage was struck down by the B.C. Supreme Court on 7 March 1988 in an action lodged by the B.C. Civil Liberties Association.

This raises a larger point about the nature of party politics in B.C.. In contrast to party systems in others provinces and at the federal level, B.C. politics are highly polarized along ideological lines. As a result, provincial elections in B.C. typically present voters with a stark choice between "free enterprise" and "socialism." During the 1960's and 1970's, the gulf between the Social Credit and the NDP was arguably more rhetorical than substantive, reflecting the "Keynesian consensus" which broadly shaped social and economic policy across Canada during this period. The recession of the early 1980's, however, awakened latent ideological predilections within the Social Credit party and provided it with a political pretext to administer a stiff dose of neo-conservative medicine to the province. It is true that most governments in Canada responded to the recession by pursuing monetarist policies of some description, notably by restraining increases in public spending and, at the federal level, pursuing a policy of high interest rates. In B.C., however, the term "restraint" took on a broader meaning, embracing not only expenditure cuts but also an attack on trade union powers, tenants' rights, and even the province's Human Rights Code. The relatively minor cost savings realized by the restraint programme have also led many observers to conclude that it was dictated by political rather than fiscal imperatives.[3]

The Government's unconciliatory response to *Silano* may therefore be seen to fit into the larger pattern of polarized politics in the province. This is further underscored by the Government's readiness to exploit and, indeed, to promote public scepticism about the plight of welfare recipients. For example, several weeks before the Court rendered its judgment in *Silano* , Social Services Minister Claude Richmond publicly advised welfare recipients to pick fruit in the Okanagan and Fraser Valleys.[4] As noted earlier, a previous Social Credit minister for social services, Bill Vander Zalm, also called into question the willingness of welfare recipients to take available work. In short, the political right in B.C. considers welfare recipients to be a legitimate target of attack.

---

[3] As Angela Redish notes, under the Canada Assistance Plan the provinces are reimbursed by the Federal Government for 50% of their social assistance expenditures. The B.C. Government therefore saved less than half of the money it withdrew from GAIN, taking into account also the loss of tax receipts which would have been generated on consumer transactions entered into by GAIN recipients. "Social Policy and 'Restraint'" in Robert C. Allen et al., eds., 152-169, *Restraining the Economy* (Vancouver: New Star Books, 1986), 154.

Phillips

In the *Phillips* case, the Nova Scotia Government responded to the ruling of the province's Court of Appeal by extending family benefits to single fathers at the same rate as those paid to single mothers. Up to that point, the Government had steadfastly refused to make such benefits available to single fathers. This position reflected the Government's reluctance to undertake new social spending commitments. It was also consistent with the government's professed concern for traditional family values (and with the traditional sex roles implicit in such values).

I am not aware whether the Government, in responding to the Appeal Court rulings, seriously considered the other alternatives available to it: namely, the elimination or reduction of mothers' benefits. (A third alternative, of course, would have been an appeal of the Appeal Court's rulings to the Supreme Court of Canada.) However, there are several reasons why the Government is unlikely to have considered these choices.

First, the courts find the purpose of the Act to be the relief of poverty. They also find provision for the needs of dependant children to be "an integral part" of the

---

[4] *Vancouver Sun* 19 June 1987, A-19.

Act.[5] These findings demolished the Government's contention that the Act could be sustained under section 15(2) of the Charter as an affirmative action programme for single mothers. They also made clear the fact that any reduction in family benefits designed to offset the cost of expanding the programme would be borne by the children of single mothers. In political terms, this would have been difficult for the Government to defend, especially in view of the considerable publicity which had surrounded this issue. After all, the plight of needy children is wont to attract public sympathy, largely because children are not deemed to be responsible (legally or morally) for their own economic maintenance. In this respect, the case differs from *Silano* , which concerned the payment of welfare benefits to "employable" single adults without children.

A second consideration relates to the ideological orientation of the Buchanan Government and the nature of party politics in Nova Scotia. As noted earlier, one element of the Government's platform in the 1981 election was the reaffirmation of "family values." As Kavanagh observes, this is a code-phrase used by conservative politicians to denote a planned curtailment of state support for family services.[6] In Nova Scotia, this took the form of a variety of measures, including the the suspension of payments to teenage mothers pending the commencement of child support proceedings against the father.[7] These measures, however, did not reflect a comprehensive ideological commitment on the part of the Government to some neo-conservative notion of limited government. On the contrary, ideology does not loom large in Nova Scotia politics. The two major parties, the Conservatives and the Liberals, are "brokerage parties" in the classic sense of the term. As such, they seek to mobilize electoral support from all social groups and to avoid a consistent identification with policies and symbols which might fragment that support. The major parties are therefore flexible, rather than programmatic, in their approach to policy issues. The NDP, on the other hand, takes a more ideological approach to politics. While it has so far failed to break out of its third-party status, growing support for the Party in the mid-1980's (particularly in the Halifax-Dartmouth metropolitan region) became a matter of some concern to the other two parties.[8]

---

[5] (1986) 27 DLR (4th) 159.

[6] Kavanagh, *John Buchanan* , 146.

[7] *Ibid.*

In view of these considerations, the Government's response to the Appeal Court's ruling may be characterized as an act of political pragmatism. On the one hand, the Government was clearly displeased with the fiscal implications of the court's decision. In the words of Social Services Minister Edmund Morris, the ruling would cost the province "many millions of dollars."[9] On the other hand, the Buchanan Government, unlike its B.C. counterpart, was not ideologically wedded to maintaining at any cost the size of the social welfare budget.[10]. On the contrary, the Government arguably had no political incentive to inflame this controversy by announcing a B.C.-style reduction in mothers' benefits. Such a move would have played into the hands of the NDP, which had doggedly pursued the issue for four years. More specifically, it might have opened a wider debate about social welfare policy in the province--the very kind of class-cleaving issue which brokerage parties strive assiduously to avoid.

Schachter

In complying with the Federal Court's ruling in *Schachter*, the Mulroney Government extended child care benefits to natural parents, while reducing those payable to adoptive parents. At first blush, this would appear to be a logical response for the Government, given its stated aim of controlling both its general budget deficit and, more particularly, the deficit in the Unemployment Insurance programme. There are, however, additional factors to consider in attempting to understand the Government's response.

---

[8] *Ibid.*, 4.

[9] "Welfare Act discriminatory" *Halifax Chronicle-Herald* , 28 November 1986, 1.

[10] In addition, as noted earlier, the impact on provincial coffers of additional social welfare spending is softened by federal contributions under the Canada Assistance Plan.

First, it is true that since taking office in 1984, the Mulroney Government has assigned a high priority to controlling and reversing the growth of its budget deficit. To this end, it has pursued a variety of cost-cutting measures, from the closure of rural post offices to the sale of crown corporations and the reduction of subsidies to federal departments and agencies, including the CBC and Via Rail.[11] Despite the controversial nature of many of these measures, the Government has not been oblivious to their electoral consequences. On the contrary, given the regional nature of voting behaviour in Canada, it has shown a clear sensitivity to the regional political impact of its policies. This is reflected in the allocation of federal contracts and other largesse, such as the awarding of the CF-18 fighter contract to Quebec in 1985 and the billion-dollar aid package to Saskachewan farmers on the eve of the provincial election in 1986. It is also reflected in the Government's tactical retreat on reform of the Unemployment Insurance programme.

Shortly after taking office, the Government appointed a Royal Commission, headed by Claude Forget, to study reforms to the Unemployment Insurance programme. The Commission's Report, delivered in November, 1986, proposed a sweeping overhaul of the Act which would have resulted in a net reduction in benefits payments of some $3 billion. The Report provoked an immediate political outcry across the country, especially in regions of high unemployment such as the the Maritimes and Quebec.[12] In response to this opposition--which included a substantial number of Conservative MP's--the Government flatly disowned the Report. It did not unveil an alternative set of UI reforms until after the 1988 election.

---

[11] In addition, and despite the Government's disclaimers, an important goal of the GST introduced in January, 1991 is the enhancement of general government revenues.

The Government's Unemployment Insurance bill, Bill C-21, avoided the most contentious proposals contained in the ill-fated Forget Report. Nevertheless, many of its provisions sparked vigorous opposition in both Houses, particularly the Bill's proposal to link benefit periods and minimum work requirements to local unemployment rates. Indeed, as noted earlier, the Bill's progress in the Senate was stalled by the insistence of Senate Liberals that public hearings be held on the Bill. Senate obstruction of the Government's Goods and Services Tax legislation further delayed passage of the UI Bill.

In view of these considerations, the Government's response to the *Schachter* ruling may be said to represent a compromise. On the one hand, the extension of 10 weeks of child care benefits to natural parents represents one of the few expansionary measures in the revised Unemployment Insurance Act, the overall thrust of which is to tighten the terms of eligibility for benefits. On the other hand, the Government mitigates the cost of these new measures to some extent by reducing adoptive parents' benefits.[13] In so doing, it is able to claim political credit for controlling the cost of the programme without incurring the electoral risks associated with programme cuts which have a disproportionate impact on politically important regions of the country.

---

[12] Atlantic Canada was particularly incensed by the Report's proposal for the elimination of special UI benefits for fishermen.

[13] Interestingly, the Forget Report recommended the extension of 15 weeks of child-care benefits to natural parents with no reduction in adoptive parents' benefits.

Adoptive parents, after all, constitute an equivalent proportion of the population of every region.

A second consideration concerns the immediate circumstances in which the Government implemented its response to the *Schachter* ruling. As noted above, the relevant amendments were part of a larger package of amendments to the Unemployment Insurance Act. Because of the omnibus nature of the Bill, opposition to particular elements of it was undoubtedly diluted. It is arguable, therefore, that the proposed reductions in adoptive parents' benefits generated less opposition than would have been the case had this step been taken in isolation from other, more contentious changes to the Act. In this connection, it is interesting to note that the Nova Scotia Government's response to the Appeal Court ruling was not overshadowed by other planned changes to the legislation.

A third consideration concerns the impact of the Government's response on those adversely affected by it.[14] Like its B.C. counterpart, the Mulroney Government responded to the court ruling by reducing benefits previously payable to a group of recipients. The nature and consequences of these moves, however, are qualitatively different. The B.C. Government's reduction of welfare benefits for persons 26 or older immediately curtailed the ability of such persons to meet their basic economic needs. Indeed, it may well have forced many to turn to private agencies, such as food banks, to compensate for the loss. In short, the Government's action imposed significant hardship on the individuals affected. The Mulroney Government's action was rather less drastic. First, the Government reduced the number of weeks for which adoptive parents may claim child care benefits. It did not reduce the quantum of such payments. Secondly, these benefits do not represent the last tier of public support on which adoptive parents may rely. On the contrary, adoptive parents continue to be eligible for regular UI benefits once their child care benefits are exhausted. They may subsequently claim provincial social assistance should the need arise.

---

[14] I am indebted to Professor Ian Urquhart for bringing this point to my attention.

Summary

In the cases reviewed above, the governments responded in different ways to Charter rulings invalidating certain inequalities in social benefits programmes. Of the three courses of action identified by Mr. Justice Strayer, two governments chose to eliminate the inequality by reducing benefits payable to another class of recipients while the third chose to provide full benefits to all relevant classes of claimants. In none of the cases did the government choose to eliminate the programme altogether as a means of achieving "equal treatment."

The cases suggest a mixture of factors which may influence a government's choice between the first two alternatives. These factors include the centrality (or ideological nature) of the government's commitment to curtail social spending; the extent to which party competition is polarized around issues such as the size of the welfare state; the political resources (including sympathetic public opinion) commanded by the group whose benefits stand to be cut; and the nature of the benefits in question. The relative importance of these factors will undoubtedly vary in different cases. One of those factors, moreover, can be largely discounted: namely, the existence of an ideologically polarized party system. Such a party system is found only in B.C. and, to a lesser extent, Saskatchewan. It may therefore be difficult to anticipate the course of action which a government is likely to take in responding to Charter rulings in this area.

Political Significance

Several observations may be made about the broader political significance of the cases. First, it is clear that Charter litigation has an important role to play in pressuring governments to address inequalities in the benefit levels or eligibility criteria of social programmes. In declaring invalid the provisions of a particular programme, the court effectively obliges the state to address itself to the various alternatives available to it to bring the programme into conformity with the Charter. In the *Silano* and *Phillips* cases, the B.C. and Nova Scotia governments were clearly unwilling to amend the relevant provisions until required to do so by the courts.

In the *Schachter* case, it is unclear whether the Government would have addressed the issue of child care benefits in the absence of the Federal Court's ruling. As noted earlier, a parliamentary committee and a royal commission had recommended that action be taken on this issue in 1985 and 1986. By 1988, the only step which the Government had taken was a minor amendment permitting natural fathers to draw paternity benefits in the event of the death or disability of the natural mother. Even assuming that the Government had already accepted the principle of extending child care benefits to natural parents, it may well have had its own political timetable for implementing this objective. For example, it may have wished to announce its policy on the matter at a more politically opportune time, such as a future election campaign. Alternatively, the Government may have wished to delay implementation of this measure until its fiscal position had improved. In either event, the Federal Court's ruling obliged the Government to move the issue higher up on its political agenda.

This has important implications for the future development of the welfare state. Historically, social welfare programmes in Canada have developed in an incremental fashion. For example, basic old age pensions, when originally introduced in 1927, were restricted to persons 70 or older, subject to a means test. In subsequent decades, the scope of pension benefits was progressively widened, notably with the adoption of the Canada Pension Plan (CPP) (which lowered the qualifying age to 65 and made provision for disability and survivors' pensions) and the Guaranteed Income Supplement.[15] The nature and timing of such extensions of the social security net have frequently been conditioned by partisan political considerations. For example, the introduction of family allowances in 1944 was designed in part to improve the Liberals' political fortunes in advance of the 1945 federal election.[16] Similarly, at the mid-point of the 1982 Saskatchewan provincial election campaign, the governing New Democrats attempted to re-vitalize their faltering campaign by hastily unveiling a plan to expand coverage of the province's subsidized dental plan.

The piecemeal development of the welfare state has also been conditioned by governmental considerations of cost. Indeed, in weighing the competing political demands placed on them, governments generally consider not only the political implications of such demands but also their fiscal implications. This is illustrated by the Federal Government's response in 1985 to Opposition demands for an extension of the old age security programme (OAS). Under this programme, a pensioner's spouse is eligible to receive an income-tested allowance at age 60. Needy individuals between 60 and 64 who are single, separated, or divorced are not eligible for comparable benefits. While acknowledging that this distinction might contravene the Charter, the Minister of National Health and Welfare insisted that financial constraints precluded the Government from extending the OAS benefit to everyone at age 60.[17]

---

[15] Dennis Guest, *The Emergence of Social Security in Canada* (Vancouver: UBC Press, 1980) 150.
[16] *Ibid.*, 131-132.
[17] House of Commons Debates, 4 February 1985, 1941-44.

Unlike the legislature, the courts are not ostensibly concerned with the partisan political implications of their decisions. Costs, moreover, "are at best a secondary consideration for the courts."[18] While costs may be relevant to the court's review of legislation under section 1 of the Charter, in general terms "judicial inquiry is narrowly focused on the question of whether or not a right exists or has been violated."[19] As a result, the Charter may be used to require Governments to fill "gaps" in the welfare system which they have not seen fit to address. In this way, the courts have become an important actor in determining the nature and pace of reform to the welfare state.

Another matter which the cases raise is the role of Charter litigation in re-allocating public expenditures on social welfare. This is clearly illustrated by the *Silano* and *Schachter* cases. In both cases, the litigants were successful in causing the state to increase or extend benefits to themselves and to claimants in their class. This was achieved, however, at the expense of another class of claimants whose benefits were reduced. In other words, Messrs. Silano and Schachter were successful in using the Charter to gain a larger slice of the social welfare pie at least in part by leaving a smaller slice for others.[20]

This effective redistribution of social resources may take place between as well as within programmes. In the former case, however, it may not be as easily detected. Thus, while the Buchanan Government extended full family benefits to single fathers, the cost of this measure may in fact have led to cutbacks in other programmes or to the shelving or trimming of new programmes. Broadly speaking, unless the state is prepared to raise taxes or incur a higher deficit to defray the cost of judicially-directed extensions of social benefits, it will be obliged to curtail current expenditures. As Allan Hutchinson puts it, "[a] pull in one direction in the social fabric will lead to a tear in another part."[21]

---

[18] F.L. Morton and Leslie A. Pal, "The impact of the Charter of Rights on public administration," *Canadian Public Administration* 28:2 (1985) 233.

[19] *Ibid.*

[20] In fairness, this was not part of their intention. Indeed, Schachter criticized the subsequent reduction in adoptive parents' benefits, accusing the Government of using the Federal Court ruling as a pretext behind which "to accomplish part of its hidden agenda of cutting back social programmes." (*Globe and Mail* , 8 January 1991, A-14).

To the extent that Charter litigation of this kind enables particular groups to effect a reallocation of social welfare benefits in their favour, the courts thereby become an additionally important arena of political activity. This in turn raises questions about the accessibility of the courts, both to those who wish to challenge particular benefits provisions and to those who may be adversely affected by such challenges. In all three of the cases discussed in this section, the legal expenses of the litigants were assumed by external agencies. In *Silano* and *Phillips* , the actions were conducted by privately-funded legal agencies. Schachter, meanwhile, received a grant under the federal Court Challenges Programme.[22] With the exception of the constitutional reference arising from the *Phillips* case, however, no special provisions were made to hear the views of other groups having an interest in the legislation.[23] Thus, in *Silano* , welfare claimants 26 or over were not specifically heard from during the proceedings. Similarly, in *Schachter* adoptive parents were not represented before the court.[24]

---

[21] "Redressing wrongs done under the Charter of Rights," *Globe and Mail* , 14 March 1990, A-8.

[22] The Court Challenges Programme is a federal programme, administered by the Canadian Council on Social Development, which provides funding to individuals and non-profit groups to launch test cases on the equality and language rights provisions of the Constitution. Funds are also allocated to groups to intervene in relevant cases. The Programme only applies to cases dealing with federal legislation. No comparable programme has yet been established at the provincial level.

[23] In the constitutional reference on Nova Scotia's Family Benefits Act, notice of the hearing was published in newspapers across the province and interested persons were invited to make submissions. Pursuant to Nova Scotia's Constitutional Questions Act, a lawyer with the Dalhousie Legal Aid Clinic was appointed to represent "eight intervenors representing various social and community groups interested in the proceedings" (75 NSR (2d) 338 at 341).

[24] However, as noted earlier, an intervention was made by the Women's Legal Education Action Fund (LEAF), which was successful in urging the Court explicitly to reject a legislative solution entailing the reduction of maternity benefits. LEAF's intervention, interestingly, was also financed by a grant from the Court Challenges Programme.

This emphasizes the growing gulf between the increasingly "legislative" nature of the business of the court and the non-legislative structure of the institution. Thus, while Charter challenges frequently affect the interests of numerous groups, the proceedings are still conducted as contests between two parties. Indeed, in privately-sponsored Charter cases (as opposed to constitutional references), there are very strict rules governing the intervention of interested "third parties." Indeed, "it is only in the exceptional case that interveners will be heard."[25] As a result, the courts may be determining the fate of "discriminatory" benefits programmes or weighing the "reasonable limits" of such programmes without hearing from groups having a vital interest in the ultimate outcome of the case.

D. Conclusion

In closing, it is clear that the Charter has important implications for the welfare state. It enables individuals and groups to challenge the adequacy and even the legitmacy of social benefit programmes. Where the courts find particular provisions to be invalid, the government is obliged to formulate an appropriate response. As a result, the matter moves higher up the government's political agenda.

Actions brought under section 15(1) of the Charter appear to be an effective means by which litigants may gain access to particular social benefits. The price of such access, however, may be a reallocation of benefits away from other groups. The courts, therefore, may be an important battleground for the re-structuring of the welfare state in the 1990's.

---

[25] *Equality Rights--Three Years Later: Equality Rights Annual Report, 1987-88* (Ottawa: Canadian Council on Social Development, 1988), 18.

6. Conclusion

This paper has explored, in a preliminary way, the relation between the Charter of Rights and Freedoms and the welfare state. It began by discussing four broad implications of the Charter for the development of the welfare state: namely, the recognition of substantive welfare rights; the use of the Charter as a constitutional battering ram to demolish social programmes; the development of procedural welfare rights; and the use of the equality provisions of the Charter to expand the scope of existing social benefits. The paper studied four cases in which the Charter has been used in the pursuit of two of these aims. The first of these concerned a challenge to an important element of the workers' compensation system. In the other three cases, the Charter was used with a view to raising the benefit levels or broadening the coverage of various social benefit programmes.

The challenge to workers' compensation in Newfoundland represented a frontal assault on a keystone of the welfare state using the open-ended provisions of the Charter. In rejecting the claim, the appellate courts provided a strong indication that future challenges to the essential purpose and structure of social programmes are unlikely to be successful. While this case is certainly not the courts' last word on the matter, it has undoubtedly dampened the early enthusiasm of those who hoped that the Charter might be capable of rolling back the welfare state. In this connection, it is noteworthy that the General Council of the Canadian Medical Association decided at its annual meeting in Regina in August, 1990 to abandon its five-year Charter challenge to the Canada Health Act. [1] This decision was reached not only on the basis of legal advice, but also on political grounds. As one delegate put it: "The only thing we would get from a successful challenge is a hostile public."[2]

---

[1] The CMA launched its suit in July, 1985 in the Supreme Court of Ontario, alleging, among other things, that the provisions of the CHA imposing penalties on provinces which permitted extra-billing by doctors or the charging of hospital user fees constituted a denial of the rights of doctors and patients to freedom of contract, security of the person, equality of treatment, and freedom of association, contrary to sections 7, 15(1), and 2(d) of the Charter. See Morris Manning, "Canada Health Act:

The other three cases indicate that Charter litigation may serve as an instrument with which to compel the state to address inequalities in the benefits levels or coverage of established social programmes when other political "remedies" fail. While such litigation may be fruitful for the group which is seeking "equal benefit of the law," it may result in a reallocation of benefits by the government away from other classes of recipients. While the precise governmental response may be difficult to predict, it [illegible] clear that the "legislative aftermath" of much Charter litigation provides the true measure of its impact on public policy. It is only at this stage that the winners and losers of such litigation can be accurately determined.

As noted at the beginning of this study, there have been relatively few Charter cases to date which have been launched in the field of social welfare policy. This undoubtedly reflects, in part, the meagre resources available to the poor with which to pursue legal action. In addition, the generally low level of political efficacy exhibited by the poor may also be reflect ed in a lack of confidence in the legal system. Nevertheless, as governments increasingly curtail or renege on their social welfare commitments, it is likely that individuals and political activists will resort to litigation in increasing numbers in the years ahead to protect or expand the social benefits to which they feel entitled.[3] The success of such actions, in turn, will undoubtedly encourage a

---

unpalatable carrot, unconstitutional stick" *Canadian Medical Association Journal* 134 (15 May 1986): 1166-67. The Ontario Medical Association launched a similar action in June, 1986 following a 26-day doctors' strike protesting Ontario's banning of extra-billing. The two actions were joined that same month.

[2] "General Council calls an end to expensive CHA court battle" *Canadian Medical Association Journal* 15 September 143:6 (1990): 534.

[3] Indeed, the provinces have already challenged the legality of recent federal cutbacks in transfer payments under the Canada Assistance Plan. See *Reference re Canada Assistance Plan* (1990) 71 DLR (4th) 99 (BCCA).

multiplicity of further actions. As a result, the courts can be expected to play an increasingly important role in shaping the future development of the welfare state in Canada.

Bibliography

Banting, Keith. *The Welfare State and Canadian Federalism*. 2nd Edition. McGill-Queen's University Press, 1987.

Bayefsky, Anne F. and Mary Eberts ed. *Equality Rights and the Canadian Charter of Rights and Freedoms* . Carswell, 1985.

Berlin, Sir Isaiah. "Two Concepts of Liberty." *Four Essays on Liberty*. Oxford University Press, 1960. 118-172.

Bluman, Barbara R. "The Workers' Compensation System--A Modern Perspective." *The Advocate* . (1987) 391-396.

Brodsky, Gwen and Shelagh Day. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* Ottawa: Canadian Advisory Council on the Status of Women, 1989.

Cairns, Alan C. and Cynthia Williams. "Overview." In ed. Alan Cairns and Cynthia Williams, 1-50. *Constitutionalism, Citizenship, and Society in Canada.* Toronto: University of Toronto Press, 1985.

Cairns, Alan C. "The Canadian Constitutional Experiment." In ed. Douglas E. Williams, 229-56.*Constitution, Government, and Society: Selected Essays by Alan C. Cairns* . Toronto: McClelland and Stewart, 1988.

Campbell, Charles. "The Canadian Left and the Charter of Rights." In ed. Robert Martin, 30-44. *Socialist Studies: Critical Perspectives on the Constitution.* Winnipeg: Society for Socialist Studies, 1984.

Canadian Council on Social Development. *Equality Rights--Three Years Later: Equality Rights Annual Report*. Ottawa, 1988.

Canada. *Success in the Works: A Labour Force Development Strategy for Canada*. Ottawa: Employment and Immigration, 1989.

Carroll, William K. "The Solidarity Coalition." In ed. Warren Magnusson *et al.*, 94-113. *The New Reality: The Politics of Restraint in British Columbia* , Vancouver: New Star Books, 1984. .

Dahl, Robert A. *Democracy in the United States: Promise and Performance*. 3rd Edition. Chicago, Rand McNally, 1976.

Dawkins, Joan M. "Living to Fight Another Day: The Story of Dalhousie Legal Aid." *Journal of Law and Social Policy* 3 (1988): 1-20.

Crocker, Lawrence. *Positive Liberty*. The Hague: Martinus Nijhoff, 1980.

Gibson, Dale. *The Law of the Charter: Equality Rights*. Carswell, 1990.

Guest, Dennis. *The Emergence of Social Security in Canada*. Vancouver: University of British Columbia Press, 1980.

Hogg, Peter W. *Constitutional Law of Canada*. 2nd Edition. Toronto: Carswell, 1985.

Hutchinson, Allan C. and Andrew Petter. "Private Rights, Public Wrongs: The Liberal Lie of the Charter." *University of Toronto Law Journal*. 38 (1988): 278.

Jackman, Martha. "The Protection of Welfare Rights under the Charter." *Ottawa Law Review*. 20:2 (1988): 257.

Johnstone, Ian. "Section 7 of the Charter and Constitutionally Protected Welfare." *University of Toronto Faculty of Law Review*. 46 (1988): 11-47.

Kavanagh, Peter. *John Buchanan: The Art of Political Survival*. Halifax: Formac, 1988.

Knopff, Rainer and F.L. Morton. "Nation-Building and the Canadian Charter of Rights and Freedoms." In ed. Alan Cairns and Cynthia Williams, 133-182 *Constitutionalism, Citizenship, and Society in Canada,* Toronto: University of Toronto Press, 1985.

Lipset, Seymour M. *Continental Divide*. Toronto: C.D. Howe Institute, 1989.

Macdonald, R.A. "Postscript and Prelude--the Jurisprudence of the Charter: Eight Theses." *Supreme Court Law Review* 4 (1982): 321-47.

MacMillan, C. Michael. "Social versus Political Rights." *Canadian Journal of Political Science* 19:2 (June 1986): 283-304.

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Wall and Thompson, 1989.

Mishra, Ramesh. *The Welfare State in Capitalist Society*. Toronto: University of Toronto Press, 1990.

Monahan, Patrick. *Politics and the Constitution*. Toronto: Carswell, 1987.

Morrison, Ian. "Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare." *Journal of Law and Social Policy* 4 (1988): 1-32.

Morton, F.L. and Leslie A. Pal. "The impact of the Charter of Rights on public administration." *Canadian Public Administration*. 28:2 (1985): 221-243.

Morton, F.L.. "The Political Impact of the Canadian Charter of Rights and Freedoms." *Canadian Journal of Political Science*. 20:1 (March 1987): 31-55.

Persky, Stan. *Fantasy Government: Bill Vander Zalm and the Future of Social Credit*. Vancouver: New Star Books, 1989.

Petter, Andrew. "Immaculate Deception: The Charter's Hidden Agenda." *The Advocate*. 45 (1987): 859.

Piva, Michael J. "The Workmen's Compensation Movement in Ontario." *Ontario History*. 67:1 (1975): 39-56.

Redish, Angela. "Social Policy and 'Restraint'." In ed. Robert C. Allen *et al.*, 152-169. *Restraining the Economy*. Vancouver: New Star Books, 1986.

Report of the Commission of Inquiry on Unemployment Insurance. Ottawa, 1986.

Report of the Parliamentary Committee on Equality Rights. Ottawa, 1985.

Risk, R.C.B. "'The Nuisance of Litigation': The Origins of Workers' Compensation in Ontario." In ed., David H. Flaherty, 418-491. *Essays in the History of Canadian Law*. Vol. 2. Osgoode Society, 1983.

Romanow, Roy. "And Justice for Whom?" *Manitoba Law Journal* 16:2 (1986): 102.

Romanow, Roy; John Whyte: and Howard Leeson. *Canada Notwithstanding*. Toronto: Carswell-Methuen, 1984.

Russell, Peter H. "Canada's Charter of Rights and Freedoms: A Political Report." In ed. A.W. Bradley, 385-401. *Public Law*. London: Stevens and Sons, 1988.

______."The Effect of a Charter of Rights on the policy-making role of Canadian courts." (1982) 25 *Canadian Public Administration*. 1.

______."The Political Purposes of the Canadian Charter of Rights and Freedoms." *Canadian Bar Review*. .30 (1983): 30-54.

Smiley, Donald V. *The Canadian Charter of Rights and Freedoms*. Toronto: Ontario Economic Council, 1981.

______.*The Federal Condition in Canada*. Toronto: McGraw-Hill Ryerson, 1987.

Social Assistance Review Committee. *Transitions*. Toronto: Queen's Printer, 1988.

Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. *Minutes of Proceedings and Evidence*, 1980-81.

Special Senate Committee on Poverty. *Poverty in Canada*. Ottawa: Information Canada, 1971.

Sypnowich, Christine. "Constitutional Change and the Malaise of the Canadian Welfare State." Paper prepared for Canadian Political Science Meetings, 1984.

Tasse, Roger. "Application of the Canadian Charter of Rights and Freedoms." In ed. Gerald-A. Beaudoin and Ed Ratushny, 65-126. *The Canadian Charter of Rights and Freedoms*. Toronto: Carswell, 1989.

Taylor, Charles. "Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada." In ed. Alan Cairns and Cynthia Williams, 183-230. *Constitutionalism, Citizenship, and Society in Canada* . Toronto: University of Toronto Press, 1985.

Whitaker, Reg. "Democracy and the Canadian Constitution." In ed. Keith Banting and Richard Simeon, 240-60. *And No One Cheered: Federalism, Democracy, and the Constitution Act* . Toronto: Methuen, 1983.

Wolfe, Christopher. *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law.* New York: Basic Books, 1986.